COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME II

(Pages 452–902)

1986

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ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE

ADJUDICATIONS

1986

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Thus: 1986 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1986.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, as amended. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1921-A of the Administrative Code, provides as follows:

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4009.1; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a); the Dam Safety and Encroachment Acts, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21; and the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, 58 P.S. §601.506. Also, the Board reviews the Department's assessment of civil penalties under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.17(f); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b); the Coal Refuse Disposal Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.61; the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.13(g); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, §6018.605; and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S.§ 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its Secretary is appointed by the Board with the approval of the Governor.

The department is always a party before the Board. Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties. In third party appeals from permit issuances, the department often does not actively participate in the appeal, but lets the permittee defend the permit issuance.

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1 Section 472 of the Administrative Code, 71 P.S. §180-2.

2 Section 709 of the Administrative Code, 71 P.S. §249(m).

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appellant's license. DER therefore found that this violation reflected a higher degree of willfulness. Our review of the evidence does not support this finding. The evidence indicates that the unlicensed shipment took place prior to the conversations referred to above. Therefore, we have no basis on which to distinguish the last of the seventeen post-February 8th violations from the preceding sixteen such violations.

DER assessed a penalty of $1000 for each of these sixteen violations. Though these violations continued to be of low severity, we feel that reckless violations must be taken much more seriously than negligent violations in determining the amount of a civil penalty. On this basis we would have upheld a penalty of more than $1000 per violation, since that amount is only 4% of the possible maximum penalty of $25,000 prescribed by SWMA. We will not increase the penalty which DER assessed for these violations, however, if only because any appellant, including this appellant, should be free to appeal a civil penalty assessment without fear that the result of the appeal will be an even greater penalty.[11] Therefore, we uphold the $16,000 penalty for the sixteen license condition violations and, consistent with our discussion supra, we likewise assess a penalty of $1000 for the seventeenth such violation. In summary, DER's civil penalty assessment has been reduced from DER's $82,000 total to $35,400.

11. As we noted, supra, p. 34 , DER now has a written internal policy which it uses in determining the amount of a civil penalty to be assessed under section 605 of SWMA. Without commenting in any fashion upon the merits of this policy, which is not at issue in this appeal, we believe it worthwhile to note that if DER had assessed the penalty here under that policy, based upon the facts as the Board has found them, i.e., that the majority of the violations were negligent and all were environmentally inconsequential, the minimum penalty assessed by DER would have been in the neighborhood of $288,000.

F. THE LICENSE DENIAL

Waiver

DER denied appellant's application for renewal of the hazardous waste transporter license on March 14, 1984. Appellant contends that since DER amended its license twice -- once on February 9, 1984 and again on February 28, 1984 -- it has waived its "right" to deny appellant's hazardous waste license application. Appellant cites Linda Coal and Supply Company v. Tasa Coal Company, 416 Pa. 97, 204 A.2d 451 (1964). We do not find Linda Coal to be controlling. There, unlike the instant matter, the issue was whether, despite fraudulent misrepresentations made by a party to a contract, the other party had waived its right of action for such misrepresentation as a consequence of its renegotiation of the contract after the true facts became known. First, we note that the issue here is not a matter of rights as between private parties, whether under contract or otherwise. DER does not have a "right" to deny a license for violations of law; it has a duty to do so where the established facts indicate that sufficiently serious violations have occurred. Secondly, there has been no allegation of fraud made in the present appeal.

Disposition of this issue is controlled by the decision of the Pennsylvania Superior Court in In re Whitford's Liquor License, 166 Pa.Super.48, 70 A.2d 708 (1950). There, as here, the issue was whether a state administrative agency had properly decided not to renew the appellant's license. The Court held that even where the agency had mistakenly issued a license at an earlier date in violation of law, it was not precluded from correcting its own errors and denying the license, once those errors came to light.[12]

12. We emphasize that in reaching this conclusion we are not holding that DER erred in approving the amendments to appellant's existing transporter license in February, 1984. The issue of the propriety of those amendments is not before us here.

The estoppel holdings cited supra, e.g., Lackawanna and Sussex, are completely consistent with Whitford's. Therefore, we conclude that no finding of waiver on the part of DER is sustainable under the facts of this appeal.

Construction of Section §503 of SWMA

DER's denial of appellant's Hazardous Waste Transporter License renewal application was based upon section 503(c) of SWMA which reads in relevant part as follows:

> (c) In carrying out the provisions of this act, the department may deny . . . any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act . . . or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act . . . or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations.
> 35 P.S. §6018.503(c). (emphasis added)

Appellant argues that section 503(c) must be read in conjunction with section 503(d) of SWMA. Section 503(d) states:

> (d) Any person which has engaged in unlawful conduct as defined in this act . . . shall be denied any permit or license required by this act unless the permit or license application demonstrates

to the satisfaction of the department that the unlawful conduct has been corrected.[13] 35 P.S. §6018.503(d).

It is appellant's contention that taken together these two statutory provisions indicate that DER may deny a license only upon finding that the applicant either is currently violating the act or the regulations or has shown a lack of ability or intention to comply with the provisions of the Act and the regulations. Appellant argues that the facts of this case will not support a finding that it lacks the ability or intention to comply with the law and asserts that since none of the violations which DER has cited are of a continuing nature, DER is required by section 503 to issue the transporter license to appellant.

Appellant's construction of section 503 is overly narrow. Subsection (c) authorizes DER to deny a license or permit under any one of three circumstances: 1) where the applicant in the past has failed to comply with the legal provisions described in the subsection, regardless of whether those violations have been corrected; 2) where the applicant has outstanding uncorrected violations;

13. Pursuant to section 103 of SWMA, 35 P.S. §6018.103, "person" is defined to include a corporation.

Section 610 of SWMA 35 P.S. §6018.610, provides that it is unlawful for any person to, inter alia:

* * *

(4) Store, collect, transport, process, treat, or dispose of, or assist in the storage, collection, transportation, processing, treatment, or disposal of, solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.

(5) Transport hazardous waste without first having obtained a license from the department to conduct such transport activities.

(6) Transport or permit the transportation of any solid waste to any storage, treatment, processing or disposal facility or area unless such facility or area possesses a permit issued by the department to accept such wastes, or contrary to the rules or regulations adopted under this act, or orders of the department, or in such a manner as to adversely affect or endanger the public health, safety and welfare or environment through which such transportation occurs.

* * *

(9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

or 3) where DER finds, based upon past or existing violations, that the applicant has demonstrated a lack of ability or intention to comply with the applicable law. This construction of section 503(c) derives from the repeated use of the disjunctive "or" in that subsection. (See the quoted provision, supra).

Subsection (c) grants DER discretionary authority. DER is not required automatically to deny a license or permit to anyone who ever has violated the Commonwealth's environmental laws. Wisniewski v. DER et al. EHB Docket No. 82-045-G (Adjudication dated February 7, 1986). Rather, in determining whether the license or permit should be issued, DER must take into account a variety of factors and determine whether denial is "reasonable and appropriate under the circumstances." Commonwealth, DER v. Mill Service, Inc., 21 Pa.Cmwlth 642, 347 A.2d 503 (1975).

Subsection (d) does alter the discretionary authority granted DER by subsection (c) of §503 to a limited extent. As the plain language of subsection (d) suggests, its purpose is simply to set forth who bears the burden of demonstrating that past unlawful conduct has or has not been corrected during DER review of the license or permit application. Subsection (d) makes clear that the burden is upon the applicant to demonstrate that past violations have been corrected; and not upon DER to prove that the violations continue to exist. Thus, where the applicant fails to provide documentation in its application sufficient to demonstrate that the violations have been resolved, DER must deny the permit. Under subsection (c), however, even if the violations in fact have been corrected, DER nevertheless may refuse to issue the license or permit. Thus, appellant's contention that it has no continuing violations and therefore

must be issued a permit is without merit.

Whether the License Denial was a Proper Exercise of DER's Discretion

DER's denial of appellant's license was based upon DER's findings that: (i) appellant had transported types of hazardous waste for which it did not have a properly conditioned license, and (ii) appellant had accepted hazardous wastes for off-site shipment without properly completed manifests. Based upon these two findings DER concluded that appellant had failed to comply with the provisions of the Solid Waste Management Act and that appellant lacked the ability or intention to transport solid waste in compliance with the laws of the Commonwealth.

In reaching its decision to deny the license, DER did not consider the seven shipments of hazardous waste which appellant transported from Sun Oil to American Refining on November 28, 1984, since those shipments had not yet taken place. During the hearing on the merits of this appeal, however, the Board permitted the introduction of evidence pertaining to those shipments under the theory that since the Board has authority to exercise de novo review of DER actions, evidence which is relevant to a determination of the propriety of those actions should be considered, even if the evidence came to the attention of DER after the fact. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556; King Coal Company v. DER, EHB Docket No. 83-112-G (Adjudication dated March 18, 1985).

As discussed more fully supra — in the context of our review of the civil penalty assessment -- most of the numerous violations committed by appellant between the date it first was issued a hazardous waste transporter license and the date DER denied the application for a renewed license represented

no worse than negligent conduct on the part of appellant. But, as noted, the circumstances surrounding several of the shipments of toxic waste after February 8, 1984 support a finding that those violations were the result of reckless conduct on appellant's part. There can be little question that appellant has been extremely lax about ascertaining that it was complying with the applicable law. This is particularly true with regard to the shipments from Sun Oil in November of 1984. While there may have been some question as to the actual properties of the material being offered for shipment the manifests accompanying the material indicated that it was hazardous waste. Appellant's employees should have been trained to realize that material accompanied by a hazardous waste manifest requires a licensed transporter. Appellant has admitted that its drivers were not so trained. This is perhaps the most disturbing of the many violations committed by appellant. The drivers who handled the Sun Oil shipments routinely handle transport of hazardous material, and hazardous waste is a subcategory of hazardous material. 49 CFR §171.8; 75 Pa.C.S.A.§102. Yet appellant admits that these drivers had no training in the proper transport of hazardous waste.

Nevertheless, the violations at issue did not result in any environmental damage and appellant never has had a hazardous waste spill in connection with its transport activities within Pennsylvania. Taking all these factors into consideration we conclude that, although it is true that appellant has failed to comply with the Solid Waste Management Act, the failure is not so egregious as to warrant the denial of its transporter license. Similarly, we do not believe that the violations at issue here support DER's conclusion that appellant lacks the ability or intention to comply. Appellant did act promptly -- if somewhat

inefficiently — in attempting to remedy the problems with its transporter license once it was made aware that the problems existed. In short, we conclude that DER's denial of appellant's transporter license renewal application was an abuse of its discretion.

We note finally that DER has the authority to suspend, modify, or revoke an existing license if it finds that the transporter has violated the applicable law. 35 P.S. §6018.503(c). If, after appellant's license is reinstated, the pattern of violations which characterized appellant's activities from 1982 to 1984 reappears, DER would have these sanctions available to it.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to and subject matter of this appeal. 71 P.S. §510.21.

2. The burden of proof in an appeal from a civil penalty assessment rests with DER. Black Fox Mining and Development Corporation v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985).

3. The burden of proof in an appeal from a license denial rests with the appellant. 25 Pa. Code §21.101(c)(1).

4. Appellant is precluded from challenging in this proceeding the content or validity of the conditions imposed upon its hazardous waste transporter license, issued by DER in 1982. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976).

5. DER cannot be estopped under the facts of this case because there has been no showing that highly placed Commonwealth officials made affirmative representations upon which the appellant relied to its substantial detriment. Commonwealth,

DPW v. UEC, Inc., 483 Pa. 503, 397 A.2d 779 (1979).

6. DER cannot be estopped under the facts of this case because there has been no showing that DER personnel were not exercising a governmental function pursuant to SWMA. Lackawanna Refuse Removal Inc. v. DER, 65 Pa.Cmwlth 372, 442 A.2d 423 (1982).

7. The Environmental Hearing Board has authority to rule upon the constitutionality of a regulation promulgated by the Environmental Quality Board where the challenge to the regulation is raised in the context of a particular DER action applying that regulation to a given party. St. Joe Minerals v. Goddard, 14 Pa.Cmwlth 624, 324 A.2d 800 (1974).

8. Due process requires that laws give persons of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that they may act accordingly. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); U.S.Const., 14th Amendment.

9. The DER regulations governing the handling of "toxic" hazardous waste are not unconstitutionally vague. 25 Pa.Code §75.261(h).

10. Appellant transported hazardous waste without a license authorizing such transport on seven occasions on November 28, 1984 in violation of section 501(b) of SWMA, 35 P.S. §6018.501(b).

11. Appellant transported 119 shipments of types of hazardous waste without a license authorizing shipment of those waste types in violation of section 403(a) of SWMA, 35 P.S. §6018.403(a). These violations were negligent violations.

12. Appellant transported 17 shipments of types of hazardous waste after February 8, 1984 without a license authorizing shipment of those waste types in violation of section 403(a) of SWMA. These violations were reckless violations.

13. Appellant accepted five shipments of hazardous waste for transport

without properly completed manifests prior to February 24, 1984 in violation of section 403(b) of SWMA 35 P.S. §6018.403(b) and 25 Pa.Code §75.263(d). These violations were negligent violations.

14. Appellant accepted seven shipments of hazardous waste for transport without properly completed manifests on November 28, 1984 in violation of section 403(b) of SWMA and 25 Pa.Code §75.263(d).

15. The violations which DER considered in assessing the civil penalty against appellant were of a low degree of severity.

16. Where the face of a hazardous waste manifest describes the material to be shipped as hazardous waste, a licensed hazardous waste transporter is required in order to transport the waste, unless and until satisfactory proof is presented to indicate that the material in fact is not hazardous waste.

17. Pennsylvania is not preempted by federal law from requiring that a hazardous waste transporter ascertain that an entry for the hazard code of the waste to be shipped has been made in block J of the hazardous waste manifest before accepting the waste for shipment. Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; Hazardous Materials Transportation Act, 49 U.S.C. §1801 et seq: 40 CFR §271.10(h)(2)(vii).

18. DER has the authority under section 605 of SWMA, 35 P.S. §6018.605, to assess a civil penalty for a violation of the conditions of a hazardous waste transporter license.

19. DER's internal policy interpreting the requirements of section 605 of SWMA is a statement of policy, and not a regulation which must be promulgated pursuant to the rule-making and publication requirements of the Commonwealth Documents Law, 45 P.S. §1102 et seq.

20. Section 605 of SWMA requires that the willfulness of a violation

be considered in determining the amount of a civil penalty to be assessed for the violation. As used in this section, willfulness includes intentional, reckless and negligent conduct.

21. An intentional violation is characterized by a deliberate intent to circumvent or violate the law or to otherwise cause harm.

22. A reckless violation is one which results from a conscious disregard of the fact that one's conduct could result in a violation of law or that harm otherwise could result.

23. A negligent violation is one which results from the failure to exercise reasonable care to prevent the violation from occurring.

24. Deterrence is a proper factor to be considered in determining the amount of a civil penalty.

25. A civil penalty must be calculated to reasonably fit the violations. Trevorton Anthracite Co. v. DER, 42 Pa.Cmwlth 84, 400 A.2d 240 (1979).

26. DER's decision to assess a civil penalty was a proper exercise of its discretion. The amount of the penalty which DER calculated, however, represents an abuse of its discretion in that it fails to take into account the cumulative effect of an assessment of an identical amount for each of a very large number of violations. In other words, the penalty is not calculated to reasonably fit the violations at issue.

27. DER is not estopped from denying a hazardous waste transporter license even where it had allowed amendment to that license shortly prior to

the denial action. Whitford's Liquor License, 166 Pa.Super.48, 70 A.2d 708 (1950).

28. Section 503(c) of SWMA, 35 P.S. §6018.503, grants DER discretionary authority to deny a hazardous waste transporter license under any of three circumstances: 1) where the applicant in the past has failed to comply with the legal provisions set forth in section 503(c); 2) where the applicant has outstanding uncorrected violations of those legal provisions; and 3) where the applicant has demonstrated a lack of ability or intention to comply with the applicable law.

29. Section 503(d) of SWMA, 35 P.S. §6018.503(d), places the burden upon the applicant to demonstrate during the permit or license review process that past unlawful conduct has been corrected. It is not DER's burden, in reviewing a permit or license application, to demonstrate that the violations continue to exist. Where the applicant fails to meet this burden, DER must deny the application.

30. A DER decision to deny a license must be reasonable and appropriate under the circumstances. Commonwealth, DER v. Mill Service Inc., 21 Pa.Cmwlth 642, 347 A.2d 503 (1975).

31. DER's decision to deny appellant's hazardous waste transporter license renewal application was an abuse of its discretion.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that this consolidated appeal is sustained in part and dismissed in part.

1. DER's decision to deny appellant's hazardous waste transporter license is reversed.

2. DER's decision to assess a civil penalty is affirmed; however, the amount of the civil penalty is modified to a total of $35,400.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Chairman

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: May 14, 1986

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SOUTHWEST EQUIPMENT
RENTAL, INC., d/b/a
SOUTHWEST MOTOR FREIGHT :

:

Docket No. 83-175-M

Issued: May 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board

Syllabus

This appeal of a civil penalty assessment for unlicensed transport of hazardous waste under the Solid Waste Management Act, 35 P.S. §6018.101 et seq., is sustained in part and dismissed in part.

Appellant violated the Solid Waste Management Act and the associated regulations, 25 Pa. Code, Chapter 75, and therefore, assessment of a civil penalty was proper. However, DER erred in calculating the amount of the penalty to be assessed. Contrary to DER's finding, appellant's conduct does not evidence a high degree of "willfulness"; appellant's conduct was negligent. Therefore, the Board reduces the amount of the civil penalty to conform to the degree of willfulness established by the record in this appeal.

In determining the amount of a civil penalty the Board is required to take into consideration those factors listed in 35 P.S. §6018.605, i.e.

the willfulness of the violation, damage to the natural resources of the Commonwealth or their uses, costs of restoration and abatement, savings resulting to the operator and other relevant factors. The Board has in the past construed the term willfulness to encompass intentional, reckless and negligent activity. A civil penalty should be calculated to eliminate any profit which the operator has generated as a result of its unlawful activity. Deterrence is a relevant factor for consideration in determining the amount of a civil penalty.

Pursuant to 35 P.S. §6018.605, a separate civil penalty may be assessed for each load of hazardous waste transported without a license in violation of the Solid Waste Management Act. The Act specifically provides that each violation of the act may result in a civil penalty and that where a violation continues for more than a single day, a separate penalty may be assessed for each day the violation persists. In addition, a separate civil penalty may be assessed for each violation of the manifesting requirements of the Act and the regulations.

Corporate officers may be held jointly and severally liable with the corporation for violations of the Solid Waste Management Act. However, in order to hold the officers liable, there must be a showing that the officers had participated to some extent in the conduct leading to the violations or there must be a showing sufficient to justify piercing the corporate veil. No such showing was made on the record presented here. The party seeking to hold corporate officers jointly and severally liable for such violations bears the burden of pleading and proving the facts necessary to establish such liability.

FINDINGS OF FACT

1. The appellant is Southwest Equipment Rental, Inc. a California corporation doing business as Southwest Motor Freight with an office at 2931 S. Market St., Chattanooga, Tennessee 34708 (hereinafter "Southwest").

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the administrative agency of the Commonwealth empowered to administer and enforce the provisions of the Solid Waste Management Act, 35 P.S. §6018.101 et seq., and the regulations promulgated thereunder.

3. Clyde M. Fuller is president of Southwest.

4. Max Fuller is vice-president of Southwest.

5. Elizabeth Fuller is Secretary-Treasurer of Southwest.

6. Patrick Quinn is vice-president and general manager of Southwest; he serves as general manager of the corporation and also is responsible for legal matters as general counsel for Southwest. (Tr. 86-7)

7. Thomas Lovingood is an employee of Southwest who works in licensing and permits under the supervision of Mr. Quinn. (Tr. 121)

8. Patricia Robbins is an administrative officer within the DER Bureau of Hazardous Waste Management whose duties include the review and processing of applications for Hazardous Waste Transporter Licenses. (Tr. 59)

9. Cheryl Payton is an employee in the Hazardous Substances Transportation Division of the Pennsylvania Department of Transportation ("PennDOT"). (Tr. 157-8)

10. Southwest never has received a Hazardous Waste Transporter License from DER.

11. Southwest submitted an application for a Hazardous Waste Transporter License which application was received by DER on November 16, 1982.

12. After DER received Southwest's application for a Hazardous Waste Transporter License DER sent Southwest a "bond letter", dated December 13, 1982. (Tr. 6-7; DER Ex. 29)

13. The bond letter notified Southwest that in order to obtain its Hazardous Waste Transporter License it would have to submit:

1) a collateral bond form
2) a collateral bond in the amount of $20,000
3) a contingency plan
4) a "Module 10" Compliance History Module.

(DER Ex. 29)

14. Southwest received the bond letter described in finding of fact 13, supra, in late December 1982 or early January 1983. (Tr. 114-15)

15. On February 1, 1983 Patricia Robbins of DER received a letter of credit from Southwest which was made payable to PennDOT. (Tr. 59)

16. The letter of credit was submitted by Southwest in response to the DER bond letter. (Tr. 93)

17. Since the letter of credit was made out to PennDOT, rather than DER, it was ineffective to satisfy DER requirements; DER returned the letter of credit to Southwest, which received the same on February 4, 1983. (Tr. 61).

18. As of February 1, 1983, with the exception of the letter of credit made out to PennDOT, DER had received none of the documents required by the bond letter of December 13, 1982. (Tr. 59, 61).

19. On February 10, 1983 DER received an acceptable letter of credit, a collateral bond, a contingency plan and a collateral bond form from Southwest. (Tr. 62)

20. Southwest transported twenty-two shipments of "silvex" from the Chevron Chemical Company facility in Lebanon, Pa. to Chemical Waste Management in Emelle, Alabama between February 1, 1983 and February 18, 1983.

21. Silvex is a listed hazardous waste pursuant to section 75.261(h) 4(vi) of 25 Pa. Code. (Tr. 10)

22. The silvex transported by Southwest was ignitable and toxic. (Tr.39-40)

23. On February 10, 1983 DER received the first of the hazardous waste manifests for the silvex shipments. (Tr. 21)

24. Mr. Tritt, chief of DER's transportation and reporting section within the Bureau of Hazardous Waste Management, was aware on February 10, 1983, when he received the first manifest for the silvex shipments, that Southwest did not have a license for transporting hazardous waste within Pennsylvania. He therefore referred the matter to DER enforcement personnel. (Tr. 33-4)

25. DER has assessed a civil penalty in the amount of $22,000 for the 22 shipments of silvex from Chevron to Chemical Waste Management during February, 1983. In calculating the amount of the civil penalty, DER assessed $1000 per shipment. DER did not assess a separate amount for violations concerning the completion of manifests but simply considered those violations to provide an additional justification for the $1000 per shipment penalty. (Tr. 17, 48).

26. In assessing the civil penalty, DER took the following factors into account: willfulness of the violations, profit to the transporter, deterrence to the transporter, deterrence to the industry in general, and the fact that some of the manifests associated with the 22 shipments were improperly completed.(Tr.11-20)

27. Prior to the date of the shipments of silvex, neither Mr. Quinn nor Mr. Lovingood was aware that Southwest did not have authorization from DER to transport hazardous waste in Pennsylvania. Prior to February 1, 1983, Mr. Lovingood advised Mr. Quinn that Mr. Lovingood believed Southwest had received

such authorization. (Tr. 95, 131, 149).

28. Mr. Lovingood believed that Southwest had authorization because he was under the mistaken impression that all administrative matters concerning gaining such authorization had been taken care of. (Tr. 146-49)

29. At the time Mr. Lovingood held this belief, he was unaware that he had been dealing with two distinct Pennsylvania administrative agencies, both of which regulate hazardous waste transport within the Commonwealth, i.e., the Pennsylvania Department of Environmental Resources (DER) and the Pennsylvania Department of Transportation (PennDOT). (Tr. 146-48)

30. The application which Southwest had to complete in order to receive a Hazardous Waste Transporter License from DER contained the following statement under the portion titled "Instructions":

> After reviewing the completed application form the Department will notify the applicant by letter of the bonding and insurance requirements. After the Department approval of the collateral bond and the certificate of insurance, a license can be issued. A copy of the license is required to be carried on each vehicle transporting hazardous waste. (Tr. 141; App. Ex. 1)

31. Mr. Lovingood completed Southwest's Hazardous Waste Transporter License application. In so doing he read the instructions quoted in finding of fact 30, supra. (Tr. 140-41)

32. As of November, 1982, when the application for the Hazardous Waste Transporter License was completed by Mr. Lovingood, Mr. Lovingood was aware that he was making application to the Pennsylvania Department of Environmental Resources for a Hazardous Waste Transporter license. (Tr. 142)

33. At the time that Mr. Lovingood advised Mr. Quinn that Southwest was authorized to transport hazardous waste within Pennsylvania, Mr. Lovingood either had forgotten or was confused concerning the separate existences of the

Pennsylvania Departments of Transportation and of Environmental Resources. (Tr. 131-2; 138)

34. Ms. Robbins of DER did not advise Mr. Lovingood or Southwest that Southwest was authorized to transport hazardous waste within Pennsylvania. (Tr. 65)

35. Cheryl Payton may have advised Mr. Lovingood sometime prior to February 1, 1983 that, as far as PennDOT was concerned, Southwest was authorized to transport hazardous waste within Pennsylvania. (Tr. 131, 167)

36. No environmental harm occurred as a result of the unlicensed transports of silvex by Southwest. (Tr. 35).

37. There were no costs for clean-up or restoration as a result of the unlicensed shipments of silvex by Southwest. (Tr. 35).

38. As far as DER is aware, all of the silvex shipments reached a proper disposal facility. (Tr. 35)

39. Southwest submitted a collateral bond to DER in connection with its application for a Hazardous Waste Transporter License. The bond was in the amount of $20,000 which would be sufficient to authorize transport of ignitable, corrosive, EP toxic and toxic solid hazardous waste and EP toxic liquid hazardous waste. (Tr. 37)

40. Southwest's shipments of silvex were shipments of ignitable and toxic liquid hazardous waste, i.e., a type of waste for which Southwest had not requested a license. (Tr. 37)

41. Had Southwest requested a license to cover toxic and ignitable liquid hazardous waste, it would have been required to post a bond of $40,000. (Tr. 55)

42. The gross receipts realized by Southwest from the silvex shipments are based upon a tariff rate of $1.17 per mile for shipments in the 800 to 900 mile range. The actual gross receipts realized by Southwest depend upon the exact distance between the Chevron Chemical Company in Lebanon, Pennsylvania and the Chemical Waste Management disposal facility in Emelle, Alabama. (Tr. 117)

43. Patrick Quinn stated that the distance between the Chevron Chemical Company and the Chemical Waste Management facility in Emelle, Alabama is 819 miles. (Tr. 117).

44. If Southwest realized an approximate profit of 25 cents per mile from the silvex shipments, its profit per shipment, excluding deadheading costs, was $204.75 assuming the distance between the Lebanon, Pennsylvania and Emelle, Alabama facilities is 819 miles.

45. "Deadhead" refers to moving a truck with no revenue load on it.

46. Southwest did not establish its specific deadheading costs for the silvex shipments; Mr. Quinn stated that: "[O]verall our deadhead average is 10 or 12 percent." (Tr. 112).

47. In assessing the amount of the civil penalty, DER considered that -- based on federal EPA data -- the average range of profit per load for hazardous waste transporters is $200-$600. (Tr. 13-14)

48. In assessing the amount of the civil penalty DER intended to eliminate any profit which Southwest may have generated as a consequence of the 22 shipments of silvex. DER had no actual knowledge of Southwest's profit margin at the time it assessed the civil penalty. (Tr. 13-14)

49. Five of the manifests for the silvex shipments were improperly completed at the time Southwest accepted the waste for transport.

50. No evidence was presented demonstrating any "participation" by Southwest's officers in the conduct resulting in the violations at issue.

51. No evidence was presented concerning the validity of Southwest as a corporate entity.

DISCUSSION

This is an appeal of a $22,000 civil penalty assessed against the appellant, Southwest Equipment Rental ("Southwest") by the Department of Environmental Resources ("DER") in connection with several shipments of hazardous waste by Southwest without a license required by the Solid Waste Management Act, 35 P.S. §6018.101 et seq. ("SWMA"). The civil penalty was accompanied by an order denying Southwest's Hazardous Waste Transporter License application; Southwest, however, has appealed only the civil penalty assessment.

Sections 401(a), 501(b), and 610(5) of SWMA, 35 P.S. §§6018.401(a), 6018.501(b), and 6018.610(5), expressly prohibit any person from transporting hazardous waste in Pennsylvania without first obtaining a license from DER. The parties have stipulated that Southwest transported twenty-two shipments of silvex from the Chevron Chemical Company facility in Lebanon, Pennsylvania to a disposal facility in Emelle, Alabama, between February 3 and February 18, 1983. Silvex is a listed hazardous waste in Pennsylvania, (25 Pa. Code §75.261(h)(4)(vi)), and was also designated as a characteristic waste with Hazard Code D001 (ignitability) on each manifest accompanying the shipments of silvex. Southwest does not dispute that transport of hazardous waste without a license is a violation of the law. Therefore, DER possessed the authority to issue a civil penalty; the issue presented here is simply whether DER properly computed the penalty amount.

Section 605 of SWMA, 35 P.S. §6018.605, sets forth the criteria applicable to the civil penalty assessed against Southwest:

> In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department . . ., the department may assess a civil penalty upon a person for such violation. Such a

> penalty may be assessed whether or not the violation was willful or negligent. In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration or abatement, savings resulting to the person in consequence of such violation, and other relevant factors. (emphasis added).

The Department has the burden of proof in an appeal of a civil penalty assessment. Black Fox Mining and Development Corp. v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985).

DER has not promulgated written regulations under section 605 of SWMA, supra, concerning the assessment of civil penalties for the unlawful transportation of hazardous waste. Rather, DER determines the amount of the penalty on a case-by-case basis. In the absence of written regulations DER's burden is to demonstrate that the $22,000 civil penalty is reasonable under the facts of this case. Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975); Western Hickory Coal Company v. DER, 1983 EHB 89, (Adjudication dated June 2, 1983), aff'd 86 Pa. Cmwlth 562, 485 A.2d 877 (1984).

A. WILLFULNESS

As section 605 explicitly states, a civil penalty can be assessed "whether or not the violation was willful or negligent." In determining the amount of the penalty, however, DER is required to consider, inter alia, the "willfulness" of the violation. In construing parallel civil penalty provisions under the Clean Streams Law, 35 P.S. §691.605, and the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, as well as section 605, the Board has recognized that the term" willfulness" includes intentional violations of law: Western Hickory Coal Co. v. DER, 1983 EHB 89 (Adjudication dated June 2, 1983); reckless violations:

Refiners Transport and Terminal Corporation v. DER, EHB Docket No. 84-132-G (Adjudication dated May 14, 1986); and negligent violations: Black Fox Mining and Development Corp. v. DER, supra.

In the Refiners decision, supra, we held that an intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care. Refiners, EHB Docket No. 84-132-G, Slip Opinion at 38-9.

DER assessed a $1000 civil penalty for each shipment of silvex by Southwest within Pennsylvania. In calculating this amount, a primary consideration was the "willfulness" of Southwest's conduct. (Tr. 46-7) DER considered this amount to be appropriate because Southwest "knew or should have known" that it had no hazardous waste transporter license at the time the illegal shipments took place. (DER brief at 43). Southwest argues that at most its conduct was negligent; it disavows any conscious appreciation of the fact that it did not have authority to transport the waste at the time it did so. (Southwest brief at 2).

In order to determine whether Southwest acted willfully, recklessly or negligently, we must first determine whether Southwest had actual knowledge of the fact that it had no license to transport hazardous waste at the time of the silvex shipments. A corporation can acquire knowledge or notice of a fact

only through its officers and agents and is charged with knowledge of all material facts which its officers or agents acquire while acting within the scope of their employment and authority, even if they do not in fact communicate it. C.J.S. Corporations §1078; A. Schulman, Inc. v. The Baer Company, Inc., 197 Pa.Super. 429, 178 A.2d 794 (1962); In re Mifflin Chemical Corp. 123 F.2d 311 (3rd. Cir. 1941) cert. denied 315 U.S. 815 (1942).

We do not find any indication on the record here that any employee or officer of Southwest had actual knowledge of the fact that it had no authorization to transport hazardous waste at the time the illegal shipments occurred. Mr. Lovingood, the employee in charge of ascertaining that the company obtained the necessary licenses, permits and so forth required for interstate movement of the company's trucks, believed that he had received verbal authorization from an employee of the Commonwealth to transport hazardous waste. This belief was erroneous and as we discuss infra, supports our conclusion that Southwest acted negligently, but it does not amount to the type of knowledge required to conclude that the company acted intentionally or recklessly in transporting the loads of waste.

Both the Pennsylvania Department of Transportation (PennDOT) and DER impose obligations upon hazardous waste transporters. PennDOT's authority now derives from the Hazardous Materials Transportation Act, P.L. 473, No. 99; 75 Pa.C.S. §8301-8308.[2] DER's authority derives from the Solid Waste Management Act, 35 P.S. §6018.101 et seq. and the regulations promulgated thereunder, 25 Pa.

2. At the time of the activities at issue here, PennDOT operated under authority of the Hazardous Substances Transportation Act, previously codified at 35 P.S. §841.1 et seq. Act 99, supra, repealed the Hazardous Substances Transportation Act effective June 30, 1984.

Code Chapter 75. The two acts and their associated regulations impose separate obligations upon persons engaging in the transport of hazardous material[3] within Pennsylvania.

Prior to the time the shipments from Chevron were to occur Southwest had been submitting information to DER in connection with its application for a hazardous waste transporter license, which DER was reviewing. During this same period Southwest also was dealing with PennDOT in connection with its authorization to transport hazardous waste. Neither Mr. Lovingood nor his superior, Mr. Quinn, vice-president of Southwest, realized until February 22 or 23, 1983, after the shipments had occurred, that they were dealing with two separate agencies.

Mr. Lovingood stated that he was told by Cheryl Payton that Southwest had authorization to transport hazardous waste in Pennsylvania and that, based upon this verbal assurance, he informed Mr. Quinn that the hazardous waste could be lawfully transported. As has since become apparent, Ms. Payton is an employee of PennDOT, not DER, and certainly possessed no authority to determine whether Southwest had met DER requirements for transport of hazardous waste. We conclude that Mr. Lovingood should have been aware that he was actually dealing with two distinct administrative agencies and that therefore, he should have recognized that Ms. Payton's apparent authorization could -- at best -- be construed as approval only on behalf of her employer, PennDOT. Moreover, it was not reasonable to assume that DER would grant verbal authorization to engage in an inherently dangerous activity such as hazardous waste transport.[4] The instructions for

3. Pursuant to 75 Pa.C.S. §102, "hazardous material" is defined to include, inter alia, hazardous waste.

4. Pursuant to section 103 of SWMA, hazardous waste is defined as material which may:

(1) cause or significantly contribute to an increase in mortality or an increase in morbidity in either an individual or the total population; or

(2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

completing the DER Hazardous Waste Transporter License application, which Mr. Lovingood admitted he had read, inform the applicant that after the applicant submits a collateral bond and a certificate of insurance "a license can be issued. A copy of the license is required to be carried on each vehicle transporting hazardous waste." This statement clearly implies that a written license will be issued.

Finally, we note that at the time the first of the silvex shipments occurred, Southwest had yet to submit the additional information requested by DER's "bond letter" of December 13, 1982 which was necessary in order to process the license application. Mr. Quinn and Mr. Lovingood, both of whom had been directly involved in the license application process, should have known that additional information was necessary before Southwest could be approved by DER for hazardous waste transport.

We appreciate that the regulatory framework with which hazardous waste transporters must deal is complex and not easily comprehended, particularly by a lay person with no familiarity with legal terminology. This fact, however, cannot excuse a failure to be aware of the law's requirements. Hazardous waste management is an activity which subjects operators to strict liability for harm caused by their operations. 35 P.S. §6018.401(b). Companies engaging in such activity owe a duty to the public to assure that their employees and agents have the training necessary to comply with the law.

In sum, we conclude that Southwest was negligent in transporting twenty-two loads of hazardous waste without a Hazardous Waste Transporter's license in violation of section 401(a) of SWMA, 35 P.S. §6018.401(a).

In addition to transporting hazardous waste without a license Southwest

violated sections 403(b)(5) and 610 of SWMA and 25 Pa. Code §75.263(d) by failing to comply with the DER manifest requirements. §75.263(d) states that before accepting hazardous waste from a generator, the transporter must assure that the manifest accompanying the waste has been properly completed by the generator pursuant to the requirements of 25 Pa. Code §75.262. Five manifests failed to indicate the date of shipment; three failed to indicate the quantity of silvex transported, and one failed to indicate the destination of shipment.

There was no testimony presented suggesting that Southwest intentionally failed to assure that the manifests were properly completed or that any employee of Southwest was aware that the manifests were incomplete but nevertheless accepted the waste for transport. We therefore conclude that Southwest was negligent in accepting the waste without properly completed manifests since it clearly was under an obligation to assure that its drivers were trained to know that accepting the waste for transport under such circumstances was a violation of law.

B. OTHER RELEVANT FACTORS

In calculating the amount of a civil penalty under section 605, DER is required to consider the following, in addition to the willfulness of the violation:

1) damage to air, water, land or other natural resources of the Commonwealth or their uses.

2) cost of restoration and abatement.

3) savings resulting to the operator in consequence of the violation and

4) other relevant factors.

Southwest's violations of SWMA, discussed above, did not cause any environmental harm and there were no associated costs of restoration or abatement. Therefore these factors will not be considered in calculating the

the amount of the civil penalty to be assessed.

Profit To Operator

DER considered the profit to Southwest from the twenty-two shipments of silvex when it assessed the civil penalty. In so doing, DER relied upon a U.S. Environmental Protection Agency publication which put the average range of transporter profit per load of hazardous waste at between two hundred and six hundred dollars. DER's reliance upon the EPA figures was not inappropriate; section 605 of SWMA mandates that DER consider the operator's costs associated with the unlawful activity. DER is unlikely to have ready access to actual dollar amounts for a particular operator in advance of litigation. Where, however, the facts developed in the evidentiary record before the Board indicate that the actual profit margin differs from the expected figures, we may adjust the amount of the penalty accordingly.

The testimony at the hearing establishes that Southwest's profit per load was in the range of two hundred and four dollars, exclusive of "deadheading" costs, i.e., the costs associated with moving an empty truck on a return trip. The exact figures for Southwest's deadhead costs were not established; the testimony only established that overall Southwest's deadhead averages 10-12%. Thus, Southwest's total profit per load of waste from Chevron to Chemical Waste Management was something less than $200 per load.

Deterrence

The Board has repeatedly recognized that deterrence is an appropriate factor to consider in determining the amount of a civil penalty. Western Hickory Coal Co. v. DER, 1983 EHB 89 (Adjudication dated June 2, 1983); DER v. Donald Cox, 1982 EHB 282 (Adjudication dated December 10, 1982); DER v. Jefferson Township,

1978 EHB 134 (Adjudication, August 17, 1978). As we stated in Cox, "clearly one of the purposes of the civil penalty is to deter other persons in the same position as [the violator] from violating" the applicable law. 1982 EHB 290.

We recognize Southwest's argument that, since DER considers that the operator's profit may range from two hundred to six hundred dollars, if it imposes a standard penalty of one thousand dollars per violation (where, e.g. it finds the violation was "willful") the net result is a decreasing deterrent effect as the operator's profit increases. We do not consider that this possibility means that DER's calculation of the civil penalty is an abuse of its discretion. Civil penalties must be calculated so as to "reasonably fit" the violation. Trevorton Anthracite Co. v. DER, 42 Pa. Cmwlth 84, 400 A.2d 240, 243 (1979). The complex nature of the legal requirements applicable to the management of hazardous waste requires that DER be granted flexibility to determine the amount of the penalty on a case by case basis, subject of course, to review by this Board. So long as the penalty assessed is reasonably calculated to take into consideration the factors listed in section 605, the fact that the deterrent effect might be slightly greater in one case than in another is not critical. What is important is assuring that the penalty assessed results in the elimination of any financial benefits accruing to the operator as a consequence of its unlawful activity.

C. THE NUMBER OF VIOLATIONS

The record indicates that two or three shipments of silvex occurred on certain days. In assessing the civil penalty, DER treated each shipment of

silvex, rather than each day shipments occurred, as a separate offense. Southwest argues that in so doing, DER was in error and that the penalty properly should be computed on a "per day", rather than "per shipment" basis.

Section 605, the civil penalty provision of SWMA, states that "each violation for each separate day and each violation of any provision of this act, any rule or regulation under this act, any order of the department, or any term or condition of any permit shall constitute a separate and distinct offense under this section." This language clearly contemplates that a penalty can be assessed for each separate violation of a statute, regulation or order of DER and that if the violation continues for more than one day, a separate penalty can be assessed for each day each violation persists. Since section 401(a) proscribes the transport of hazardous waste without a license, each transport of silvex constitutes a separate violation of SWMA for which a civil penalty properly may be assessed. Providing that penalties be calculated for "each violation of any provision of this act" is consistent with the assumption that the number of loads of hazardous waste, rather than the number of days of transport, will more closely reflect the magnitude of the potential harm to the public resulting from the unlawful activity.

In addition to transporting hazardous waste without a license, Southwest also accepted the waste for shipment without properly completed manifests in violation of 25 Pa. Code §75.263(d) and sections 403(b)(5) and 610 of SWMA, 35 P.S. §§6018.403 and 6018.610. There were five separate incomplete manifests; each instance in which Southwest accepted the shipment of hazardous waste without a fully completed manifest is a separate violation of SWMA and the regulations.

D. Joint and Several Liability of Corporate Officers

The civil penalty assessment names Southwest and its officers as the

persons[5] who have violated SWMA. The issue of the individual liability of Southwest's officers was raised for the first time at the hearing on the merits when, at the close of DER's case, counsel for Southwest noted that no evidence had been presented addressing the responsibility of the three corporate officers with regard to the activities which gave rise to this appeal.

DER argues that Southwest's failure to raise the issue of the officer's liability in its Notice of Appeal or pre-hearing memorandum constitutes a waiver of its right to argue it here. DER relies upon the Board's rules, 25 Pa. Code .21.51(e) which state that:

> Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, this Board may agree to hear such objection or objections.

5. Section 103 of SWMA defines "person" as follows:
> "Person." Any individual, partnership, corporation, association, institution, cooperative enterprise, municipal authority, Federal Government or agency, State institution and agency (including, but not limited to, the Department of General Services and the State Public School Buildings Authority), or any other legal entity whatsoever which is recognized by law as the subject of rights and duties. In any provisions of this act prescribing a fine, imprisonment or penalty, or any combination of the foregoing, the term "person" shall include the officers and directors of any corporation or other legal entity having officers and directors. 35 P.S. §6018.103.

DER misapprehends its burden. Where a party seeks to hold corporate officers personally liable for wrongful activities of the corporation, the burden rests with that party to plead and prove the facts necessary to give rise to such liability. This is true whether the basis for imposing liability on the officer derives from piercing the corporate veil or from the officer's participation in the unlawful activity. See, e.g., Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983).

The Board recently has had occasion to address the issue of a corporate officer's personal liability in circumstances where the corporation itself also may be held liable. In John E. Kaites et al. v. DER, EHB Docket No. 84-104-G (Opinion dated March 14, 1986) we stated:

> Liability under the corporate veil theory generally is premised upon findings concerning the validity of the corporation itself, e.g., undercapitalization, use of the corporate form for the personal benefit of the officer, etc. Ashley v. Ashley, 482 Pa. 228, 393 A.2d 637 (1978); College Watercolor Group v. Newbauer, 468 Pa. 103, 360 A.2d 200 (1976); Zubik v. Zubik, 384 F.2d 267 (3rd. Cir. 1967).

In discussing the officer's liability under the so-called "participation theory", we commented:

> A corporate officer . . . is not liable for violations of law attributed to the corporation merely by virtue of his position as an officer. . . .However, a decision to pursue a chosen course of conduct, accompanied by an order carrying that decision into effect can be sufficient "participation" to subject the officer to personal liability. The officer need not be the person who actually takes the actions causing the harm. Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983). Kaites, supra, slip opinion at 5.

The facts of the instant case however are insufficient to give rise to individual liability on the part of Southwest's corporate officers. The three officers, Clyde, Max and Elizabeth Fuller, had virtually no direct involvement in the license application process; of the three only Clyde Fuller was involved at all, in signing certain documents that had to be submitted in connection with the license application.

Mr. Quinn and Mr. Lovingood were the people in charge of the actual submission of these documents; they were the people dealing with DER and PennDOT. There is no indication that any of Southwest's officers participated in the conduct that gave rise to the violations at issue here, that they made any decisions resulting in those violations or that they had knowledge of the activities leading to the violations. In the absence of such a showing we must conclude that the officers cannot be held liable under the participation theory of corporate officer liability.

Likewise, the record is bare of any indication that Southwest as a corporate entity was undercapitalized, that it was being used for the personal benefit of its officers or that it otherwise was being employed in a manner which contravened public policy. Therefore the "corporate veil" theory of liability is also inapplicable. DER failed to meet its burden with respect to the individual liability of Southwest's three corporate officers; issuance of the civil penalty against them was an abuse of discretion.

E. CALCULATION OF AMOUNT OF CIVIL PENALTY

DER assessed a penalty of $1000 per load of hazardous waste transported by Southwest without a license. This amount largely was based upon DER's

conclusion that Southwest acted "willfully" in transporting the silvex shipments, in that -- in DER's view -- Southwest either knew or should have known that it did not have license authorizing such transport at the time the unlawful shipments occurred.

We agree that Southwest should have been aware that it did not possess the required Hazardous Waste Transporter License at the time of the unlawful shipments. As discussed above, the record does not support a finding that Southwest had actual knowledge that it lacked such a license, however. Therefore, its conduct cannot be characterized as "willful" in the sense of intentional, nor can it be said to be "reckless"; recklessness would require a finding that Southwest acted in conscious disregard of its knowledge that it had no license. Consequently, reduction of the amount of the civil penalty is appropriate here.

DER also based the $1000 figure on the fact that transport without a license is a serious violation. We agree; handling of hazardous waste is a serious business, and ignorance of the law's requirements, as demonstrated by Southwest's conduct here, does not mitigate this fact. However, it is true that no environmental harm resulted from Southwest's unlawful activities and there were no associated costs of restoration or abatement.

DER also based its $1000 per load figure on its estimate of Southwest's profits. As it turns out, Southwest's actual profit per load likely was somewhat less than the lower end of the profit range which DER predicted, i.e., slightly less than $200 per load. Clearly, any civil penalty assessed for a violation of the Act must be sufficiently large to eliminate any profit generated by the operator as a consequence of its unlawful activity. Otherwise, the penalty would have no deterrent effect.

Finally, DER also assessed a portion of the penalty based upon the

fact that Southwest committed additional violations of the law in that it accepted hazardous waste for shipment without assuring that the manifests accompanying those shipments were completed properly. An additional penalty for the manifest violations is entirely appropriate.

In sum, we conclude that a penalty of $1000 per shipment of silvex was excessive in light of the facts established on the record in this proceeding. We conclude that a penalty of $500 per unlicensed shipment is proper, for the first ten such violations at any rate. For each load this figure wipes out Southwest's profit and sets an additional deterrent figure of 150% of the amount of the profit Southwest anticipated. However, consistent with Refiners, supra, we do not believe a penalty this large per shipment is warranted for shipments beyond the first ten. For shipments beyond the first ten, therefore, we reduce the penalty by half, to $250. As in Refiners (where we arrived at a different reduction factor for violations beyond the first ten) our decision to reduce the penalty by half is based on the specific facts of the instant case, and on the requirement that the total penalty for these shipments without a license reasonably fit the violations. In this connection we observe that a $250 penalty is sufficient to assure that Southwest did not profit from any of the 22 shipments which were in violation of SWMA. Moreover, we also conclude that an additional penalty of $500 for each violation of the DER manifest requirements is appropriate under the facts of this appeal. Although the manifest violations undoubtedly were inadvertent, they were more than merely technical; the information omitted, e.g., the failure to indicate the destination and quantity of waste transported, was important for DER's "cradle-to-grave" hazardous waste tracking procedures. It is necessary to motivate Southwest and other hazardous waste transporters to train their drivers to carefully examine their manifests.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to and subject matter

of this appeal.

2. It is unlawful to transport hazardous waste in Pennsylvania without first having obtained a Hazardous Waste Transporter License from DER. 35 P.S. §6018.401(a).

3. Southwest unlawfully transported hazardous waste without a Hazardous Waste Transporter license on twenty-two occasions in February, 1983.

4. Southwest was negligent in believing it had obtained authorization to transport hazardous waste in Pennsylvania at the time of the unlawful shipments.

5. Under the Solid Waste Management Act, 35 P.S. §6018.605, a civil penalty may be assessed for violations of the Act whether or not the violations were willful or negligent.

6. In determining the amount of the civil penalty to be assessed, DER must consider the willfulness of the violation; damage to air, water, land or other natural resources of the Commonwealth or their uses; the cost of restoration or abatement; savings to the operator resulting from the violation; and other relevant factors. 35 P.S. §6018.605.

7. Deterrence is a relevant factor to be considered in assessing civil penalties.

8. Civil penalties must be calculated to reasonably fit the violations at issue.

9. Each transport of hazardous waste without a license constitutes a separate violation of section 401(a) of SWMA, 35 P.S. §6018.401(a), for which a civil penalty properly may be assessed.

10. Southwest violated sections 403(b)(5) and 610 of SWMA, 35 P.S. §6018.403(b)(5) and §6018.610, and 25 Pa. Code §75.263(d) in that it accepted hazardous waste for transport when the manifests accompanying the loads were improperly completed. DER may assess a civil penalty for each such violation.

11. The burden of proving facts sufficient to impose individual liability upon a corporate officer is upon the party attempting to establish such liability.

12. DER failed to meet its burden of proof with respect to the individual liability of Southwest's corporate officers; issuance of the civil penalty against the officers jointly and severally was an abuse of DER's discretion.

13. DER acted properly in deciding to assess a civil penalty against Southwest for violations of SWMA and the associated regulations; DER abused its discretion, however in determining the amount of the civil penalty to be assessed.

ORDER

WHEREFORE, it is ordered that the appeal of Southwest Equipment Rental is sustained in part and dismissed in part. A civil penalty of $10,500 shall be assessed against Southwest.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: May 14, 1986

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COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
v.	:	**EHB Docket No. 85-300-W**
	:	
PETRO-TECH, INC.	:	Issued: May 20, 1986

OPINION AND ORDER

Synopsis:

A Motion for Partial Summary Judgment filed by the Department of Environmental Resources is denied because defendant's Answer to a complaint for civil penalties is sufficient to delineate the issues in this case, but defendant will not be permitted to raise any defense at the hearing that is not set forth in its Answer. Defendant's Motion for Leave to File Second Amended Answer is granted because this amendment to the Answer will not involve surprise or prejudice to the Department, and will not violate any positive rule of law.

OPINION

On July 24, 1985, the Department of Environmental Resources (hereinafter "DER" or "Department") filed with this Board a Complaint for Civil Penalties against Petro-Tech, Inc., a corporation engaged in exploration for and production of oil in Cranberry Township, Venango County, and Washington Township, Clarion County. On August 20, 1985, Petro-Tech filed an Answer to DER's Complaint for Civil Penalties, and on September 16, 1985, Petro-Tech filed an amended Answer to DER's Complaint for Civil

Penalties. On February 3, 1986, the Board granted the Department leave to amend its Complaint for Civil Penalties.

Meanwhile, on January 30, 1986, the Department filed a Motion for Partial Summary Judgment. The Department argues, in this motion, that Petro-Tech's denials of the averments in the Department's complaint constitute general denials, and, as such, they are admissions under Rule 1029(b) of the Pennsylvania Rules of Civil Procedure. The reason that Petro-Tech's denials constitute general denials, according to the Department, is that in denying the Department's averments, Petro-Tech simply stated, "it is specifically denied that," and followed this with a reiteration of the Department's averment. Further, Petro-Tech did not affirmatively aver what did occur in the place of the facts that it denied.

In response to the Department's Motion for Partial Summary Judgment, Petro-Tech argues that in the averments in question, the Department alleges that a particular incident occurred at a particular site, on a particular date. Petro-Tech's answers specifically refer to the dates, sites, and incidents, and aver that the incidents did not occur. Petro-Tech argues that it does not know how to more completely answer the Department's averments, and that the Department's Motion for Partial Summary Judgment is based on a hypertechnical, semantic approach to Petro-Tech's answer. Also, on February 26, 1986, Petro-Tech filed an Answer to the Department's Amended Complaint, as well as, a Motion for Leave to File Second Amended Answer. The Department objects to Petro-Tech's Motion for Leave to File Second Amended Answer because the Department believes that this amendment consists of an attempt by Petro-Tech to defeat the Department's Motion for Partial Summary Judgment by drafting better answers in response to the deficiency noted in the Department's motion.

The purpose of the pleadings before the Board is to delineate the issues before the Board. See e.g. Schoenbein v. Surety Co., 1 Erie L.J. 207. Although neither the Pennsylvania Rules of Civil Procedure, nor this Board, countenances evasive denials, it is impossible to lay down an arbitrary rule for determining whether a denial is specific or general. See e.g. Bean v. Harleysville National Bank, 160 Pa.Super. 396, 51 A.2d 394 (1947). In this matter, Petro-Tech's position is that the events for which the Department seeks civil penaliies simply did not occur. The Board finds Petro-Tech's Answer sufficient to delineate the issues before the Board in this case. Moreover, the Board notes that a defendant must aver in its answer every defense upon which it intends to rely, and Petro-Tech will not be permitted, at the hearing, to raise any defense that is not set forth in its Answer. Therefore, Petro-Tech's Answer is sufficient to preclude summary judgment, but Petro-Tech will be limited at the hearing by its Answer.

Finally, the Board grants Petro-Tech's Motion for Leave to File Second Amended Answer. Under the Rules of Civil Procedure, a defendant, "with leave of court," may amend its answer at any time. Pa. R.C.P. 1033. The favored practice in Pennsylvania is that amendments to pleadings are liberally allowed, except where surprise or prejudice to the other party will result, or where the amendment is against a positive rule of law. See e.g. Bata v. Central-Penn National Bank, 423 Pa. 373, 224 A.2d 174 (1966), cert.den. 386 U.S. 1007, 18 L.Ed 433, 87 S.Ct. 1348; Posternak v. American Casualty Co., 421 Pa. 21, 218 A.2d 350 (1966). Granting Petro-Tech leave to file a second amended answer will involve no surprise or prejudice to the Department, and will not violate any positive rule of law.

ORDER

AND NOW, this 20th day of May, 1986, the Motion for Partial Summary Judgment, filed by the Department of Environmental Resources in the above-captioned matter, is denied. The Motion for Leave to File Second Amended Answer, filed by Petro-Tech, Inc. in the above-captioned matter, is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: May 20, 1986

cc: **Bureau of Litigation**
Harrisburg, PA

For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region

For Appellant:
Donald L. Herskovitz, Esq.
Washington, D.C.

bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

BRADFORD COAL CO. :

:

: Docket No. 83-061-G
: (issued May 23rd, 1986)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

DER's Motion to Limit issues is provisionally granted. Appellant and DER signed an agreement specifying actions to be taken by Bradford in connection with matters which were the subject of a DER administrative order and an order of a Court of Common Pleas. Although the agreement was drafted in the form of a consent decree it was not submitted for court approval. Therefore it is not legally effective as a consent decree. The Board, however, concludes that the record presented to date, including the parties' course of conduct after the agreement was signed, evidences an intent that it be treated as an administrative order issued to the appellant by DER. Appellant is given an opportunity to present evidence concerning its intent to be bound by the agreement. For present purposes, however, the Board considers the agreement to operate as a final order, thus precluding appellant from challenging its content or validity herein. Under the terms of the order appellant legally committed itself to replacement of certain water supplies. Therefore, appellant is precluded from litigating issues going

to its responsibility for replacing said supplies. Appellant may, however, litigate issues concerning its responsibility for certain discharges from its mine site.

OPINION

The issues addressed by this opinion have their genesis in an administrative order dated February 1, 1980 issued by the Department of Environmental Resources ("DER") to Bradford Coal Company, Inc. ("Bradford"). The factual basis for the order is DER's finding that Bradford's mining operation had affected the water supplies of several residents of the town of Egypt, Pennsylvania and that the operation had caused discharges of acid mine drainage, in violation of the Surface Mining Act, 52 P.S. §1396.1 et seq., the Clean Streams Law, 35 P.S. §691.1 et seq., and the rules and regulations promulgated thereunder. The order directed Bradford to replace the water supplies of the Egypt residents and to treat the four discharges. Bradford filed a timely appeal of the order with this Board which docketed the appeal at number 80-025-B.

While the appeal was pending before the Board, DER filed an action in equity in the Court of Common Pleas of Clearfield County seeking an injunction directing Bradford to comply with the DER order of February 1, 1980. After a hearing on the DER petition, the Court of Common Pleas, by an order dated February 19, 1981, directed Bradford to "provide a water supply to each property owner [named in the order] that is fit for human consumption." The Court's order did not address the four discharges which were described in the DER order of February 1, 1980.

Subsequently, DER and Bradford entered into an agreement, styled a "Consent Decree", which governs the manner in which Bradford would comply with the

order of the Common Pleas Court and (subject to certain conditions discussed infra) the DER order of February 1, 1980. The agreement originally was drafted for approval by the Court of Common Pleas; however, for reasons which we need not address here, the document was not submitted to the Court. DER now has filed a motion to limit issues in the consolidated appeal presently before the Board, which includes the original appeal docketed at 80-025-B as well as appeals from four additional compliance orders. The appeals were consolidated under the above-captioned docket number on June 27, 1985. DER contends that the aforesaid agreement eliminates the need for the Board to adjudicate some of the issues raised in this appeal.

We begin with Bradford's argument that the agreement which the parties executed is of no legal effect since it never was submitted to the Court of Common Pleas for approval. The agreement clearly was intended to be submitted to the court for approval; it is styled as a "consent decree". A consent decree which has been approved by a court binds the parties thereto with the same force and effect as would a judgment of the court entered after a full hearing on the merits. In Interest of John W., 300 Pa. Super. 293, 446 A.2d 621 (1982). The consent decree derives its efficacy from the court's approval. P.L.E., Judgments, §61; C.J.S., Judgments, §173. Therefore, the absence of court approval of the agreement at issue here renders the document legally ineffective as a consent decree.

This certainly need not mean that the agreement has no legal effect, however. Paragraph 21 of the agreement provides an independent basis for legal recognition of its terms:

> 21. Paragraphs 1 - 20 inclusive, of this Consent Decree shall have the force and effect of an Order of the Department issued pursuant to Sections 5, 316, 402, and 610 of the Clean Streams Law, 35 P.S. §§691.5, 691.316, 691.402 and 691.610; Section 1917-A of the Administrative Code, the Act of April 9,

> 1929, P.L. 177, 71 P.S. §510-17A; and Sections 4.2 and 4.3 of the Mining Act, 52 P.S. §1396.4(b) and §1396.4(c), the said Order being issued to Bradford Coal Company, Inc., its respective agents, successors, assigns . . . Bradford hereby agrees and consents to the terms and conditions of this Order and Decree and hereby waives its right to appeal from the issuance of this Order and Decree . . .[1]

The threshold question before us is whether this paragraph 21 is binding on the parties even though the Consent Decree, which was prepared for the court's approval, never actually was submitted to the court. This question is not answered on the face of the document, and we are aware of no legal precedent which is precisely in point. Since the parties did sign the document, however, we believe the issue of whether paragraph 21 is binding is best addressed by considering the consent decree to be similar to a contract between the parties, so that general principles governing the construction and interpretation of contracts are applicable. This approach is consistent with Pennsylvania precedents holding that consent decrees are to be treated as contracts which bind the parties to the terms thereof. Sabatine v. Commonwealth, 497 Pa. 453, 442 A.2d 210 (1981); Maxton v. Philadelphia Housing Authority, 308 Pa.Super. 444, 454 A.2d 618 (1982). We see absolutely no reason why principles of contract law should not govern interpretation of the consent decree at issue here, despite the fact that it was not entered as a consent decree by the Court of Common Pleas.

Under general principles of contract law, the legal effect of a contract should reflect the intent of the parties at the time the contract was signed. Kennedy v. Erkman, 389 Pa. 651, 133 A.2d 550 (1957). Where this intent is not

1. Bradford has admitted the existence of the agreement, the authenticity of the signatures of Bradford's officers thereon, and the authority of said officers to enter into the agreement on Bradford's behalf.

apparent from the language of the document itself, other extrinsic evidence to determine that intent should be sought. Such extrinsic evidence may include the parties' course of conduct after signing the contract. Commonwealth, DOT v. Mosites Construction Corp., 494 A.2d 41 (Pa. Cmwlth 1985). In fact, the record already made in the instant appeal contains evidence concerning the parties' post-signing course of conduct which is relevant to the threshold question before us. On February 10, 1986, Bradford filed its answers to DER's first set of requests for admissions. Answers Nos. 51-56 admitted that Exhibit 7 to these requests for admissions was "a true, correct and admissible copy" of a Joint Motion for Continuance which "on or about July 9, 1982" had been submitted to the Board by DER and Bradford in the appeal originally docketed at 80-025-B. The Board's docket at 80-025-B shows, however, that this joint motion actually only was filed on February 3, 1983, accompanied by a letter dated February 2, 1983 from Bradford's counsel to then Board Chairman Harrish. This letter states, in pertinent part:

> Last summer it was the decision of Stan Geary and myself to request in a joint motion for an indefinite continuance of this case for the reason that part of the matter had been settled and that some studying and testing was necessary to determine the culpability of Bradford with respect to discharges of mine drainage.
>
> Therefore, I take this time to present a Joint Motion for Continuance filed by myself as counsel for Bradford Coal Company and Stanley R. Geary, Esquire, Attorney for the Commonwealth. The motion is pretty much self-explanatory and requests an indefinite continuance in order to permit the parties sufficient time to reach an amicable solution to the controversies.
>
> I discussed this matter with Stan Geary on Monday, January 31, 1983, and a copy of this letter is being forwarded to him.

The Joint Motion for Continuance (the aforesaid Exhibit 7) reads, also in pertinent part:

NOW COMES, William C. Kriner, Esq., attorney for Bradford Coal Co., Inc. (hereinafter "BRADFORD"), and Stanley R. Geary, Esq., attorney for the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DEPARTMENT"), to request that a continuance be issued in the above-captioned matter for the following reasons:

1. That BRADFORD and the DEPARTMENT have executed a Consent Decree to be filed in the Clearfield County Court of Common Pleas which provides that BRADFORD shall conduct a groundwater study of the area involved in the above-captioned litigation.

2. That upon the completion of the groundwater study by BRADFORD, if all the parties to this litigation are satisfied with respect to the treatment of discharges identified by the DEPARTMENT in their February 1, 1980 Order, then further litigation in this matter is unnecessary.

3. That if the parties are unable to agree concerning BRADFORD's responsibility with respect to the discharges enumerated in the February 1, 1980 Order, then it will be necessary for the parties to litigate the issue of responsibility with respect to said discharges.

4. That the Consent Decree provides that during the period of the groundwater study and continuing until the DEPARTMENT, the Board or an Appellate Court determines BRADFORD is not responsible for said discharges, BRADFORD shall collect and treat or abate said discharges.

5. That it is in the best interest of BRADFORD and the DEPARTMENT to determine if a resolution of the problem can be found through the groundwater study and therefore continue the present litigation.

WHEREFORE, the parties jointly request the Environmental Hearing Board to continue indefinitely the hearing on the merits in the above-captioned matter in order to permit parties sufficient time to reach an amicable solution to the controversies herein involved.

Bradford has admitted that the discharges referred to in paragraph 4 of this Joint Motion are the discharges identified in the DER order of February 1, 1980 which originally was appealed at docket no. 80-025-B. In our view, this along with the texts of the Joint Motion and the February 2, 1983 letter from Bradford's counsel, make a prima facie though perhaps not incontrovertible case

that the parties executed the Consent Decree intending that its terms would be binding upon them and would settle all facets of the dispute between DER and Bradford, excepting the issue of Bradford's responsibility for treating the discharges enumerated in DER's February 1, 1980 order. The remainder of this Opinion rests on this finding. In particular, we hold that on the record before us the Consent Decree paragraph 21 must be adjudged binding on Bradford; however Bradford, at the scheduled hearing on the merits of this matter, will be permitted to describe to the Board what evidence, if any, Bradford can offer to show that the Consent Decree was not intended to be binding on Bradford unless approved by the Court of Common Pleas. If warranted in the interests of justice, the Board will schedule a hearing at some later date, to make a fuller record concerning the intent of the parties; if on the basis of this more complete record, the Board were to revise its present holding that the Consent Decree paragraph 21 is binding on Bradford, the issues limitations in this Opinion also will require revision, and the record again will have to be reopened for the purpose of hearing evidence on issues which have been foreclosed by the Order accompanying this Opinion. But in the meantime we shall proceed as if Consent Decree paragraph 21 unquestionably is binding.

We now turn to the specific language of paragraph 21 supra, which is quite unambiguous. The Board has recognized on several occasions that the type of language contained in paragraph 21 gives rise to a valid, enforceable administrative order, most recently in West Freedom Mining Corp. v. DER, EHB Docket No. 84-229-G (Adjudication dated March 14, 1986). See also William Fiore d/b/a/ Municipal and Industrial Disposal Company, 1983 EHB 528 (Opinion dated August 24, 1983); Lower Paxton Township Authority v. DER, 1982 EHB 111 (Adjudication dated July 16, 1982). We conclude that the consent decree operates as such an

administrative order.[2]

Bradford expressly waived its right to appeal the "consent decree" (which we will hereafter refer to as the "consent order"). Therefore, the consent order has become final and Bradford is precluded from attacking its "content or validity" in the present appeal. Commonwealth v. Derry Twp., 466 Pa. 31, 351 A.2d 606, 610 (1976); Commonwealth, DER v. Williams, 57 Pa. Cmwlth 8, 425 A.2d 871, 873 (1981). See also 71 P.S. §510-21(c).

DER's motion to limit issues is based upon the finality of the consent order. The motion, however, requests only that the Board preclude consideration of issues concerning Bradford's responsibility for replacement of the Egypt water supplies. DER does not contend that Bradford should be precluded from litigating the issue of its liability for the discharges described in DER's February 1, 1980 order and the four subsequent orders appealed herein; the consent order did not dispose of that issue. Rather, it expressly contemplates that Bradford might litigate its legal responsibility for those discharges at a later date. Paragraph 10 of the consent order provides in relevant part:

> Bradford shall implement an effective interim treatment for all discharges of mine drainage emanating from or originating at the Bear Hill Mine including, but not limited to the discharges which are presently being collected and treated at Bradford's treatment facility [with one specified exception] . . . upon the execution of this Consent Decree . . . Bradford shall continue to perform such interim treatment until such time as Bradford is determined not to be responsible therefor by the Department, the EHB, or an Appellate Court, or until permanent treatment or abatement is accomplished. (emphasis added).

In addition, paragraphs 8, 9, 11 and 12 of the consent order contemplate that Bradford will undertake a groundwater study concerning said discharges during

2. Since the document was not submitted to the Court of Common Pleas for approval, we find no merit in Bradford's contention that the Court has jurisdiction over it.

which time litigation concerning Bradford's responsibility for the discharges would be stayed. Paragraph 13 provides that if, after review of the study results, DER and Bradford are unable to reach an agreement concerning liability for the discharges, Bradford "shall have the full right and authority to proceed with litigation to determine legal responsibility for the discharges alleged in the February 1, 1980 Order."

The express reservation of Bradford's right to litigate the issue of its responsibility for the discharges stands in contrast to the provisions of the consent order governing Bradford's responsibility for replacement of the Egypt water supplies. Paragraphs 1 through 6 of the consent order address the latter issue and read in relevant part as follows:

> 1. That on or before May 31, 1982, BRADFORD shall construct an interim water supply system which shall be continuously maintained and supplied until such time as BRADFORD provides a permanent water supply system.
>
> 2. That the interim water supply system shall be constructed in accordance with the "Water Supply Plan for Egypt Residents" as prepared and presented by Brent Blauch, P.E., to the residents of Egypt and approved by the DEPARTMENT . . .
>
> 3. That Bradford shall maintain the interim water supply system so that the chemical quality is the same or better than the public water when it is purchased and so that bacteriologically the water meets the E.P.A. bacteriological standards as set forth in the 1962 Edition of the "Drinking Water Standards" published by the U.S. Public Health Service.
>
> 4. That upon execution of this Consent Decree, BRADFORD shall submit to the DEPARTMENT in a form satisfactory to the DEPARTMENT a bond in the amount of Fifty Thousand ($50,000.00) Dollars to guaranty the performance of paragraphs 1, 2 and 3 of this Consent Decree. If BRADFORD fails to comply with the obligations set forth in paragraph 1, 2 and 3, the bond shall be declared forfeited by the DEPARTMENT. That upon completion and implementation of a permanent water supply system by the date set forth herein or by any extension thereof pursuant to paragraph 14 hereof, said bond shall be returned to BRADFORD.

5. That on or before December 31, 1985, BRADFORD shall have completed construction and implementation of a permanent water supply and have such system functioning to provide water to the affected residents. The permanent supply must be from a public water supply, from a local source meeting the quality set forth in paragraph 6 herein or from a similar supply which does not require hauling of water.

6. That said permanent water supply shall provide water to the affected residents in compliance with the February 19, 1981, Order of the Court of Common Pleas of Clearfield County. That is, the water be fit for human consumption . . .[3]

DER argues that, by virtue of its consent to paragraphs 1 through 6, Bradford has legally bound itself to replace the affected water supplies and that consequently there is no need for the Board to address the issue of Bradford's responsibility for replacement of the supplies.

To address this argument we must construe the provisions of the consent order, again on the basis of contract principles. So doing, if we were to limit ourselves to an examination of paragraphs 1 through 6, supra, we would conclude that resolution of this issue is a fairly straight-forward matter. Unlike the provisions concerning Bradford's treatment of discharges, paragraphs 1 through 6 contain no indication whatsoever that the parties intended that Bradford would replace the water supplies while reserving the right to litigate at a later date its legal responsibility for the same. The intent manifested by those six paragraphs is unambiguous. Furthermore, if the parties had intended that Bradford reserve its right to litigate its responsibility to replace the supplies it seems much more likely that they would have provided for development and implementation of an interim supply. Paragraph 5 of the consent order, however, states that Bradford will provide a permanent replacement supply.

As Bradford notes, however, there are other paragraphs of the consent order which render impossible our sole reliance upon paragraphs 1 through 6.

3. Paragraph 6 goes on to specify the standards by which it is to be determined that the replacement water supply is "water fit for human consumption."

It argues that the parties intended to preserve Bradford's right to litigate its legal responsibility for the water supplies replacement and points to paragraph 17 which reads as follows:

> [T]he parties agree that nothing set forth in this Consent Decree is meant, nor shall it be construed as in any way affecting the issues raised in the litigation currently before the Environmental Hearing Board at Docket No. 80-025-B, being the appeal of Bradford from the Order of the Department entered February 1, 1980.

In construing the import of paragraph 17 we also must consider the effect of paragraph 16 of the consent order, which provides:

> [T]he parties agree that the terms of this Consent Decree shall supersede the terms of the Order of the Department dated February 1, 1980 and the Order of the Court of Common Pleas of Clearfield County dated February 19, 1981.

The primary consideration in interpreting a consent order, consent decree, or any other agreement, must be to ascertain the intent of the parties. Dulles v. Dulles, 369 Pa. 101, 85 A.2d 134 (1952). The language used by the parties must be read in context. Westinghouse Air Brake Division v. United Electrical, Radio and Machine Workers, 294 Pa.Super. 407, 440 A.2d 529 (1982).

It is apparent that the intent of the parties in executing paragraphs 16 and 17 is not altogether clear. The two paragraphs are, to some extent, mutually exclusive; full effect cannot be given to both. The only DER action at issue in the appeal at EHB Docket No. 80-025-B is the DER order of February 1, 1980. If the Board were to give full effect to paragraph 16 of the consent order, that appeal technically would become moot by virtue of the fact that the order appealed therein has been superseded (by agreement of the parties) and therefore can have no further legal effect. Such a holding, however, initially would appear to conflict with the parties intentions as stated in paragraph 17, i.e., that

the consent order is not to be construed as affecting the appeal pending at 80-025-B.

Where two clauses of an agreement conflict, an attempt should be made to construe them as being consistent with one another, insofar as that is reasonably possible. In re Binenstock's Trust, 410 Pa. 425, 190 A.2d 288 (1963). Keeping this principle in mind, and reading the agreement as a whole, there is an interpretation of the consent order which allows us to give limited effect to all of its provisions. We conclude that this interpretation is also the most reasonable construction and one which gives the fullest possible effect to the intent of the parties.

We begin by again noting that paragraphs 1 through 6, dealing with water supply replacement, unlike the paragraphs concerning the discharges, contain no reservation of Bradford's right to contest the issue of its responsibility. Paragraphs 1 through 6, read alone, unequivocally legally bind Bradford to replace the supplies. Given the unqualified language of these six paragraphs it is reasonable to begin with the assumption that Bradford intended to accept full legal responsibility for replacement of the water supplies, unless other language in the agreement clearly indicates a contrary intent. This conclusion is strongly reinforced by the language of the Joint Motion for Continuance, quoted supra (see especially paragraph 3 of the Joint Motion) and by the language used by Bradford's own counsel in his February 2, 1983 letter, also quoted supra.

The only provision in the consent order which possibly could be said to demonstrate such a contrary intent is paragraph 17, supra. As noted, however, the parties' purpose in including paragraph 17 is not altogether clear, since it conflicts with paragraph 16 which provides that both the DER order of February 1, 1980 and the court order of February 19, 1981 are superseded.

Paragraph 16, however, can be read as fully consistent with the other provisions of the consent order. It is clear that, with regard to the discharges from the Bear Hill site, Bradford and DER had agreed that litigation should be postponed until such time as a study concerning those discharges could be completed and reviewed. The apparent intent was to attempt to resolve the issues raised by the DER order of February 1, 1980. The language of paragraph 16 superseding that DER order is entirely consistent with this approach. The parties evidently intended to replace the obligations imposed upon Bradford by the February 1, 1980 order with a new, conditional set of obligations, memorialized in the consent order.

Bradford reserved the right to challenge at a later date the basis for the DER order with respect to these discharges. (See paragraphs 10 and 13). We believe it is reasonable to construe Paragraph 17 as simply a statement of the parties' intention that the appeal at 80-025-B not be dismissed, despite the existence of the consent order, and particularly, paragraph 16. At the time the consent order was signed, the appeal at 80-025-B was the only action pending before the Board concerning those discharges. Thus, itwould have been important for Bradford to assure -- via paragraph 17 -- that the appeal not be dismissed since such a dismissal could have effectively put Bradford out of court, depriving it of a forum within which to exercise its right to litigate the issue of responsibility for those discharges.

The provisions dealing with the replacement of water supplies similarly represent the parties' intent to resolve the issues raised by the DER order in a manner which would not require litigation. Pursuant to the order of February 19, 1981 of the Court of Common Pleas of Clearfield County, Bradford was under an obligation to replace the supplies by a specific date. We conclude that

the absence of any reservation of the right to litigate Bradford's responsibility for replacement of the supplies confirms that by signing the consent order Bradford intended to legally bind itself to replace the same. That is, the basic purpose behind entering into the consent order was to restate Bradford's obligations under the DER and court orders: paragraph 16, which supersedes the two orders, is fully consistent with this intent as manifested by the document as a whole.

In summary, by reading paragraphs 1 through 6 as an unqualified acceptance by Bradford of legal responsibility for replacement of the water supplies we are able to give full effect to the plain language of those six paragraphs. In addition, by construing paragraph 17 as a preservation of a forum within which Bradford could litigate its legal responsibility for the discharges we are able to give limited effect to that paragraph as well. And, finally, this approach enables us to give full effect to paragraph 16. In short, this construction of the consent order is the one which gives the greatest possible effect to its terms.

In contrast, if we were to accept Bradford's argument, i.e., that paragraph 17 constitutes an express reservation by Bradford of its right to litigate all issues raised by the DER order of February 1, 1980, we would have to reject paragraph 16 in its entirety. Bradford cannot have it both ways; if it intended to have the consent order operate to replace the obligations imposed upon it by the DER order, then by definition there would be no DER action remaining at issue in the appeal from that order docketed at 80-025-B. We believe that the consent order as a whole evidences an intent to supersede the DER and Court of Common Pleas orders and that paragraph 16, being simply an explicit statement

of this overall intent, should stand. Paragraph 17, therefore, must be limited in its application so as to give effect to the general intent of the parties manifested by the document as a whole.

We recognize that Bradford also has placed reliance upon paragraph J of the consent order in support of its argument that it did not intend to waive the right to litigate its responsibility for the replacement of the water supplies. Paragraph J reads as follows:

> Bradford admits to none of the allegations of the Department with respect to water degradation, discharges of industrial waste or acid mine drainage or violation of any Orders of the Department or the Court of Common Pleas of Clearfield County and furthermore, Bradford alleges and asserts that it has complied with the Order of the Department dated February 1, 1980 and the Order of the Court of Common Pleas dated February 19, 1981.

This paragraph certainly does not in itself preserve Bradford's right to litigate its legal responsibility for replacement of the water supplies. It is simply a denial of DER's allegations. In addition, paragraph J is merely a portion of the prefatory statement to the consent order. It imposes no obligations and creates no rights on the part of either party. Paragraphs 1 through 6, by contrast, constitute an agreement by Bradford to accept legal responsibility for replacement of the water supplies. Therefore, we cannot read paragraph J to modify the explicit language of paragraphs 1 through 6. Moreover, in light of Bradford's agreement to replace the water supplies, Bradford's denial of the DER allegations is simply immaterial. Bradford need not agree with DER's contentions in order to legally bind itself to remedy the existing problem with those supplies.

Thus, since we have concluded[4] that Bradford legally obligated itself to replace the Egypt water supplies there is no need for the Board to hear evidence or issue an adjudication concerning the portions of DER's February 1,

4. This conclusion rests on our provisional holding that the aforesaid paragraph 21 is binding on Bradford.

1980 order which relate to the replacement of those supplies. Bradford is under a duty to replace the same; any decision by this Board concerning Bradford's responsibility for causing the problem with the supplies will not alter this fact. Such an opinion would grant Bradford no relief since it has an independent obligation under the terms of the consent order to replace the supplies.

Bradford, however, argues that a Board determination of its responsibility for contamination of the Egypt water supplies would not be merely advisory since it has implications with regard to possible future civil penalty assessments by DER. Thus, it contends, it has a stake in the controversy, and the Board should deny DER's motion.

In Al Hamilton Contracting Company v. Commonwealth, DER, Pa.Cmwlth , 494 A.2d 516, 518 (1985) the Commonwealth Court ruled that the standard for determining whether the Board should dismiss an appeal as moot is "whether the litigant has been deprived of the necessary stake in the outcome . . . or whether the court (or agency) will be able to grant effective relief." (citations omitted). As we noted supra, since Bradford has bound itself to replace the water supplies, for the purposes of the DER order of February 1, 1980, there is no relief which the Board can grant in this proceeding. That is, even if the Board were to determine, after a full hearing on the merits, that DER's issuance of the order was an abuse of its discretion (see Warren Sand and Gravel v. Commonwealth, DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975)) Bradford nevertheless would be obligated to replace the water supplies. Therefore, we need concern ourselves only with the first portion of the Al Hamilton test, i.e., whether Bradford has a stake in the outcome of this appeal.

In Al Hamilton, the court concluded that the Board erred in dismissing an appeal from a compliance order as moot, despite the fact that the mine operator had complied with the terms of the order, because the operator had a stake in the controversy by virtue of the fact that in assessing a civil penalty for the violation which was the subject of the order, DER would apply the "penalty escalation" provision of 25 Pa.Code §86.194. §86.194(b)(6) requires DER to consider an operator's violation history in calculating the amount of the civil penalty. Only those violations which became final in the preceding two year period are to be considered, however. §86.194 requires DER to increase the penalty by a factor of 5% for each such previous violation, not to exceed a total increase of $1000.

As the Al Hamilton decision expressly recognizes, a party appealing the assessment of a civil penalty is permitted to contest "either the amount of the penalty or the fact of the violation". Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22; Al Hamilton, 494 A.2d at 518. This provision parallels section 518 of the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1268(c), which provides:

> Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account . . . . Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty. (emphasis added).[5]

5. Under the federal Act a state may obtain primary authority ("primacy") for regulation of surface mining within its boundaries so long as federal approval of a permanent state regulatory program is maintained. The state program must be at least as stringent as the federal standards set forth in the federal Act and the regulations promulgated thereunder. 30 U.S.C. §1253. In order to obtain primacy Pennsylvania amended its Surface Mining Act, on October 10, 1980. (P.L. 835, No. 155, effective October 10, 1980).

The Al Hamilton court concluded that since the operator would have the opportunity to litigate the fact of the alleged violation in an appeal from the civil penalty assessment, it has a separate remedy and therefore, no stake in the litigation of the underlying order citing the operator for the alleged violation. 494 A.2d at 518.

We have some difficulty reconciling this holding with the remaining portion of the Al Hamilton decision. Despite its express recognition that the opportunity to litigate the issue of the violation eliminates any stake in the underlying appeal of the DER order, the court concluded that "the penalty escalation provision constitutes a stake in the outcome", precluding a dismissal of the underlying appeal as moot. 494 A.2d at 519. The penalty escalation provision authorizes DER to rely upon only those violations which have beome final. A violation cannot become final until the operator has had the opportunity to appeal. 71 P.S. §510-21(c). As the court in Al Hamilton recognized, section 18.4 of the Surface Mining Act grants the operator such an opportunity. This opportunity exists regardless of whether the operator has appealed a previous DER action citing the operator for the violation.[6] Moreover, DER will retain the burden of proving the violations on which it relies for penalty escalation;

6. Although we believe this interpretation derives directly from the plain language of section 18.4, as well as section 518 of the federal Act, supra, the federal regulatons governing appeals of civil penalties assessed by the Department of the Interior, Office of Surface Mining, under the federal Act explicitly state that this is the case. 43 CFR §4.1163 provides:

> Failure to file an application for review of a notice of violation or order of cessation shall not preclude challenging the fact of violation during a civil penalty proceeding.

Under the federal program a "notice of violation" is equivalent to a DER compliance order. See 30 U.S.C. §§1271 and 1260(c). The term "Notice of Violation" under the Pennsylvania program carries different connotations, which are not relevant here. See Sunbeam Coal Corporation v. Commonwealth, DER, 8 Pa. Cmwlth 622, 304 A.2d 169 (1973).

Of course, if an operator has actually litigated the issue of the underlying violation in, e.g., an appeal from a compliance order, it may not raise the issue again in the civil penalty proceeding. See 30 CFR §723.19(a).

also, the Board sees no reason to think (as the Al Hamilton court apparently feared the Board might think) that complying with a compliance order is evidence the compliance order was justified.

In short, recognition that this opportunity to appeal a penalty assessment deprives the operator of a stake in the outcome of the appeal of the compliance order seems inconsistent with the holding that the penalty escalation provision nevertheless does give the operator a stake, precluding dismissal of the compliance order appeal as moot.

In any case in which DER could assess a civil penalty under the Surface Mining Act the penalty escalation provision would apply.[7] Thus, the ultimate consequence of the Al Hamilton decision as we have read it appears to be that if there exists the possibility that DER later will assess a civil penalty for the alleged violation, the Board never can dismiss as moot an appeal of a compliance order which at some later date might trigger the penalty escalation provision of §86.194, and never can dismiss an appeal of a compliance order after the parties have signed an agreement binding the appellant to comply with the compliance order. We do not believe that the Commonwealth Court intended this result, and we can only conclude that our present reading of Al Hamilton -- which would lead to this result -- is faulty and should not be relied upon. At least in a case such as this where DER to date has assessed no civil penalty, it obviously is a deplorably inefficient use of the Board's limited resources to require it to hear evidence and issue a decision on an issue which never may form

7. Chapter 86 of Title 25, Pennsylvania Code, is promulgated under the authority of the Clean Streams Law, 35 P.S. §691.1 et seq., the Surface Mining Act, 52 P.S. §1396.1 et seq., the Subsidence Act, 52 P.S. §1406.1 et seq., and the Coal Refuse Disposal Control Act, 52 P.S. 30.51 et seq. Each of these statutes provides for the assessment of civil penalties for a "violation of any provision of this act, rule, regulation, order of the department, or a conditon of any permit issued pursuant to this act." See also 25 Pa.Code §86.191.

the basis for a penalty assessment at all. If and when DER does assess a penalty, Bradford will have the opportunity to litigate the issue of the underlying violation.

In conclusion, we hold that the Board will not address in this consolidated appeal issues going to Bradford's responsibility for replacing the Egypt water supplies. We conclude that Bradford has unconditionally obligated itself to replace the supplies and that therefore any decision which we would render on that issue would be merely advisory, particularly in light of the fact that no civil penalty has been assessed by DER concerning the alleged violation.

The Board, however, will consider issues concerning the discharges from the Bear Hill site and Bradford's responsibility for the same. Bradford expressly reserved its right to litigate these issues in paragraphs 10 and 13 of the consent order.

ORDER

WHEREFORE, this 23rd day of May, 1986 it is ordered as follows:

1. DER's Motion to Limit Issues is granted.

2. Until and unless the Board rules otherwise, this consolidated appeal will not address issues concerning Bradford's responsibility for replacement of the Egypt water supplies; the Board will not rule otherwise before the end of the hearing presently scheduled for June 23-27, 1986.

3. Bradford is not precluded from litigating issues concerning its responsibility for discharges at the Bear Hill site which discharges are described in the DER orders appealed herein.

4. At the opening of the presently scheduled June 23-27, 1986 hearings on the merits of this matter, Bradford will be permitted to petition for added hearings at a later date, for the purpose of taking evidence concerning the parties' intent to be bound when the parties executed the Consent Decree discussed in the accompanying Opinion.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: May 23, 1986
cc: Bureau of Litigation
Timothy Bergere, Esq., for the Commonwealth, DER
William C. Kriner, Esq., KRINER, KOERBER & KIRK,
Clearfield, PA, for the Appellant

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WARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

YORK TOWNSHIP	:	
	:	
V.	:	**Docket No. 86-087-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER

Synopsis

A letter from DER requesting a sewage facilities plan revision within 120 days in accordance with 35 P.S. §750.10(3) and 25 Pa. Code §71.15(a)(2) is a final action which is appealable to the Environmental Hearing Board. However, an accompanying statement of the applicability of 25 Pa. Code §71.32(a) permit limitations is not separately appealable.

Where a letter from DER contains a final order and specifically describes to what and where it applies, the mere omission of a map offering no new information will not extend the appeal period or create a two-part order. Since the letter was appealable, this appeal, filed more than 30 days after the letter was received by Appellant, is untimely.

OPINION

The above-captioned appeal involves an order of the Pennsylvania Department of Environmental Resources (DER) to York Township (Appellant) to revise its comprehensive sewage facilities plan adopted under the Pa. Sewage Facilities Act, 35 P.S. §750.1 et seq., and informing Appellant that limitations on permit issuance would be taking effect. On October 23, 1985,

DER sent a letter to Appellant addressing the inadequacy of Appellant's official sewage facilities plan and requested that Appellant submit a revised plan to DER within 120 days. The letter also advised Appellant that limitations on permit issuance were taking effect in particular areas of the township in accordance with 25 Pa. Code §71.32(a). This letter also referred to an attached map showing areas affected by the permit limitations. However, the map was apparently not enclosed and was mailed by DER to Appellant under separate cover dated January 17, 1986. The January 17, 1986 letter simply stated that the apparently forgotten map was therein enclosed. On February 18, 1986, Appellant filed the above-captioned appeal and a Petition for Supersedeas. On March 4, 1986, DER filed a motion to dismiss the appeal on the grounds that there had been no appealable action, and in the alternative that the appeal was untimely in accordance with 25 Pa. Code §21.52(a). Concerned that the motion to dismiss raised a serious question as to the jurisdiction of the Board to hear this appeal, the Board suspended action on Appellant's Petition for Supersedeas and canceled a supersedeas hearing that had been scheduled for March 7, 1986. Having received Appellant's answer to the motion to dismiss, the Board here rules on said motion.

DER's first claim is that the appeal does not concern an appealable action. The Board finds that it must disagree. DER has the power to order a municipality to submit a sewage facility plan revision to DER in accordance with 35 P.S. §750.10(3) and 25 Pa. Code §71.15(a)(2). See, Township of East Union, 1980 EHB 118. Although DER's language might have been more definite, its statement that, ". . . in accordance with Chapter 71, Section 71.15(a)(2), [DER] hereby requests York Township to revise and update its Official 537 Plan within 120 days," is, in the Board's opinion, a statement

which a reasonable person would believe to be a final action of DER which could be appealed. Even given this, however, the statement of the applicability of the 25 Pa. Code §71.32(a) limitations in that same letter is not separately appealable. Once a municipality is in the position of having been ordered to revise its plan, the permit limitations take effect automatically by operation of law. 25 Pa. Code §71.32(a). See, Gilpin Township and Frank Ravotti v. DER, 1980 EHB 91. The letter of October 23, 1985 merely advises Appellant of the applicability of 25 Pa. Code §71.32(a) to particular areas of the township. Appellant has not yet complied with DER's order to revise its official sewage facilities plan, and therefore it is within the discretion of DER to advise Appellant of the applicability of 25 Pa. Code §71.32(a) permit limitations. Gilpin, supra.

DER also argues that even if the October 23, 1985 letter is an appealable action, this appeal is untimely. The Board finds it must agree with this argument. The actions which Appellant wishes to contest, the questions of appealability aside, are both fully contained in the October 23, 1985 letter. The letter, as noted above, clearly requires submission of a plan revision. Even if the 25 Pa. Code §71.32(a) limitations were separately appealable, it is clear in the October 23, 1985 letter that a final decision or action was made as of that date. Contrary to Appellant's claim, the Board believes that the October 23, 1985 letter more than adequately describes the areas affected and is not vague. The letter specifically describes the areas in the municipality which are affected by the order and the 25 Pa. Code §71.32(a) permit limitations. The map which DER apparently failed to enclose in the October 23, 1985 letter, if of any help at all, is at best redundant. All the information Appellant needed to realize that DER had taken a final action, what the action was, and to what and where it applied, is contained

in the October 23, 1985 letter. The Board, contrary to Appellant's position, sees no way to interpret the January 17, 1986 letter as the second part of a two-part order from DER, even given that the October 23, 1985 letter makes reference to the map. It does not seem reasonable, given the language of the October 23 letter, that Appellant should have waited until not only beyond the 30-day appeal period, but until receipt of the January 17, 1986 letter to file its appeal. As noted above this appeal was not filed until February 18, 1986, well beyond the 30-day appeal period provided by 25 Pa. Code §21.52(a). The appeal period having lapsed, the Board lacks jurisdiction and must therefore dismiss. Joseph Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

The Board notes that it is cognizant that no express notice of appealability was enclosed with either of the letters in question. However, such a notice of appealability is not a legal requirement. Wheeling-Pittsburgh Corp. v. DER, 27 Pa. Cmwlth. 356, 366 A.2d 613 (1976), Spring-Benner Joint Authority v. DER, 1983 EHB 264.

ORDER

AND NOW, this 27th day of May, 1986, DER's Motion to Dismiss in the above-captioned appeal is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation
George Jugovic, Esq./DER Central
Raymond L. Hovis, Esq./For Appellant

DATED: May 27, 1986

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES :
:
V. : DOCKET NO. 81-021-CP-M
:
LAWRENCE COAL COMPANY : Issued: May 27, 1986

ADJUDICATION

By the Board

Synopsis

This matter involves a complaint by the Department of Environmental Resources (DER) against Lawrence Coal Company (Lawrence) for the assessment of civil penalties pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (CSL). It was proven by DER by a preponderance of the evidence that acid mine drainage (AMD) emanated from Lawrence's permit area and that discharges of AMD were caused or affected by Lawrence's mining operations in violation of §§3, 301, 307, 315, and 401 of the CSL and the rules and regulations adopted thereunder at 25 Pa. Code §§77.92, 95.1 and 99.33. It was further proven by a preponderance of the evidence that Lawrence failed to install and maintain adequate erosion and sediment controls in violation of §402 of the CSL and 25 Pa. Code §102.4.

Section 316 of the CSL does not provide a separate basis of liability in this case because DER has chosen to seek civil penalties rather than issue an order pursuant to §316. Violations of §401 of the CSL do not merge into violations of §§301, 307, and 315 because violating the terms and conditions

of a permit issued pursuant to these sections of the CSL is distinct from causing pollution. The discharge violations were continuous because the sampling was sufficiently close in time to establish a continuing AMD discharge.

In calculating a civil penalty, the Board did not consider the cost of restoration of the receiving waters, since DER presented no evidence as to such costs. Damage to the stream was held to be moderate, and certain violations were held to be wilful. Deterrence was also considered by the Board in assessing the penalty.

INTRODUCTION

This action involves a complaint for civil penalties filed on February 25, 1981, by DER against Lawrence for alleged violations of the CSL resulting from Lawrence's strip mining operations in Springfield Township, Fayette County.

Former Board Chairman Dennis J. Harnish presided over eleven days of hearings, which concluded on November 23, 1982. Following Chairman Harnish's resignation from the Board in May, 1983, the case was assigned to hearing examiner Edward R. Casey. Subsequently, the Board ordered the recusal of Mr. Casey for reasons recounted in an earlier Board Opinion and Order (1983 EHB 608), and assigned the case to Board Member Anthony J. Mazullo, Jr.

After the filing by both parties of post-hearing briefs, and the filing by DER of a reply brief, the record was presented for adjudication. Member Mazullo drafted an adjudication for the consideration of the Board. He resigned on January 31, 1986. The Board is adopting his draft adjudication with modifications.

FINDINGS OF FACT

1. The plaintiff is DER, the agency entrusted with the duty to enforce the provisions of the CSL.

2. The defendant is Lawrence, a corporation, which is the permittee of a surface mining operation in Springfield Township, Fayette County, which operation is referred to herein as the Rogers Mill Strip. (T 10).

3. The Rogers Mill Strip is covered by Mine Drainage Permit 3376SM15, which was issued by the Department pursuant to Section 315(a) of the CSL. (T. 11).

4. Mine Drainage Permit 3376SM15 was originally issued to William K. Tedesco on November 10, 1976. (T 11).

5. Mine Drainage Permit 3376SM15 was transferred by DER to Lawrence on July 19, 1977. (T 11).

6. Mining Permit 1063-5 is encompassed within the area covered by Mine Drainage Permit 3376SM15. (T 11).

7. Lawrence is the permittee on Mining Permit 1063-5 which was issued by DER pursuant to Section 4(a) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.

8. Mining Permit 1063-5 ("MP 5") covers an area of 63 acres and was issued to Lawrence on July 1, 1977. (T 12).

9. Drainage from the Rogers Mill Strip flows to Buck Run and its unnamed tributary. (T 13).

10. Marsolino Coal and Coke, Inc. ("Marsolino") has a mining operation located immediately uphill from the Rogers Mill Strip. This operation is referred to herein as the MP 71-27 Strip. (T 17).

11. The Rogers Mill Strip and the MP 71-27 Strip are the only two surface mining operations on the Buck Run watershed which could have had an impact on the quality of Buck Run and its unnamed tributary in the vicinity of the Rogers Mill Strip. (T 18).

12. There are three township roads in the immediate vicinity of the Rogers Mill Strip. The Rogers Mill Strip is bounded on the northwest by T-687, a paved road, which runs to the Angelo Fish Hatchery and beyond ("Fish Hatchery Road"). The site is bounded on the southeast by T-683, a dirt road, which runs to the residence and spring of Glen Pirl and beyond ("Pirl Spring Road"). The third road is T-685, a dirt road, which runs through the Rogers Mill Strip ("Haul Road"). The Haul Road joins the Pirl Spring Road approximately 150 feet from the intersection of the Pirl Spring Road and the Fish Hatchery Road. There is a bridge on the Fish Hatchery Road which crosses Buck Run and is very near this intersection ("Buck Run Bridge"). (T 22-24, DER Exhibit 1).

13. There are a number of culverts along the Pirl Spring Road which carry water under the road towards Buck Run and the Buck Run tributary. (DER Exhibit 1).

14. Buck Run is to the southeast of the Rogers Mill Strip. The Pirl Spring Road is between the Rogers Mill Strip and Buck Run. Buck Run has a tributary which is located between the main stream of Buck Run and the Pirl Spring Road ("Buck Run tributary"). The Buck Run tributary confluences with Buck Run upstream from the Buck Run Bridge between culverts 2 and 3 on Pirl Spring Road. (DER Exhibit 1).

15. Drainage from culvert 2 flows directly to Buck Run, while drainage from culverts 3 and 4 flows to the Buck Run tributary. (T 54-55).

16. Lawrence mined above the discharges at culverts 2 through 4 along the Pirl Spring Road. (T 298).

17. The area of the site is characterized by moderately steep dipping sedimentary rocks. There is frequent rolling that is at times sudden and severe. (T 713).

18. The rock formations in this area are the Middle and Lower Allegheny rock formations, with the coal seams being the Lower Kittanning through Freeport coal seams. (T 714).

19. The overburden which was mined on the site and which is evidenced by the existing highwall was a highly fractured massive sandstone 50 to 60 feet thick. The sandstone had many joints and fractures, and there were smooth faces where the joints had been weathered. This sandstone has coaly inclusions. The overburden has been fairly consistent throughout the mining operation. (T 145, 717-718).

20. Topographically, the site resembles a tongue with valleys on each side. The tongue has significant relief from the tip of the tongue at the northwest to the top of the hill in the south. The relief from the Angelo hatchery to the top of the area mined by Marsolino is about 500 feet. (T 720-721).

21. Stratigraphically, the Rogers Mill Strip had one coal seam which was mined. That coal seam was covered by a massive sandstone 50 to 60 feet thick. Immediately under the coal was a layer of shale 2 to 15 feet thick. Some 40 to 60 feet below the mined coal seam is a thin coal seam which has been referred to as the rider seam. A few drill holes indicate that there are both sandstones and shales between the mined seam and the rider seam. (T 731, 1167; DER Exhibits 34, 39; Lawrence Exhibits 5, 6, 7, and 8).

22. Structurally, the mined coal seam was fairly uniform. (T 732). The mined coal seam dipped to the northwest and in a northeast to southwest direction. The seam, or the underpavement remaining, has a moderate uniform dip beginning on the Marsolino site (MP-27 Strip) and dipping uniformly until the area of the Haul Road where there was a roll in the coal. At the roll, the dip flattens somewhat but still dips to the northwest. (T 734-735).

23. The general recharge area for the Rogers Mill Strip is the topographic high, which is the whole area of sandstone uphill from the site to the uphill cropline of the sandstone. (T 736-739).

24. The general discharge area is the lower end of the tongue, which is the west and northwest area bounded by the Pirl Spring Road and the Fish Hatchery Road. This would cover the area from the north and south WPA seals at the Angelo Hatchery along the crop line and below it along the Hatchery Road and along the Pirl Spring Road up as far as the Marsolino site. (T 737, 745-746).

25. The primary controls on groundwater flow at the Rogers Mill Strip are the topography, structure, and stratigraphy of the site. (T 747-748).

26. On the reclaimed area of the surface mine, infiltrating water will flow to the pit floor. The flow will then be controlled primarily by structure, with groundwater flowing downdip perpendicular to contour lines until it reaches a crop line where it will discharge. (T 769-770, 771).

27. The flow of the pit on the Rogers Mill Strip dips in two directions, towards the Fish Hatchery Road and towards the Pirl Spring Road. The component of dip towards the Pirl Spring Road was steeper in the area closer to the Pirl Spring Road than it was in area of the pit at the time of the view. In that area the dip towards the Pirl Spring Road was steeper than the dip towards the Fish Hatchery Road. (T 260-261).

28. Discharges can occur anywhere along the north and west croplines of the Rogers Mill Strip depending on local rolls and undulations. (T 776).

29. The floor of the pit on the Rogers Mill Strip was not perfectly flat. (T 1493).

30. The roll in the pavement of the mined site channels water towards culvert 4 on the Pirl Spring Road, and water following this course discharges

at the dead tree above culvert 4, which is below the cropline of the mined seam. (T 798).

31. The Rogers Mill Strip produces AMD. (T 794, 1024).

32. Lawrence's mining operation is a source of the toe of spoil discharge at the dead tree above culvert 4. (T 1632-1633).

33. Lawrence's mining operations at the Rogers Mill Strip have contributed to the discharge of mine drainage at the toe of spoil on MP 5 near the dead tree above culvert 4. (T 1632-1633).

34. There are no logical sources of the AMD at the culverts along T-683 except the Lawrence and Marsolino surface mines. (T 871-873)

35. Lawrence and Marsolino both mined the same coal seam. (T 1326-1327).

36. Outcrop areas, such as the area of the Rogers Mill Strip along the Pirl Spring Road, are normally fractured. (T 1614).

37. It is common for water to pass through coal crop lines. (T 1617).

38. Flows of water at culverts 2, 3, and 4 were greatly reduced after the toe of spoil mine drainage collection ditch and the two treatment ponds on MP 5 were constructed. (T 224-226, 495).

39. The quality of the seep of mine drainage into the toe of spoil collection ditch and the water seeping out of the road bank between culverts 4 and 5 is similar in most respects. (DER Exhibit 33A).

40. There is a hydrologic connection between the Rogers Mill Strip and the acid mine drainage discharges at culverts 2, 3 and 4. (T 720-721, 731, 734-735, 747-748, 871-873, 1632-1633; DER Exhibits 33, 33A, 33B, 33C).

41. There are discharges of AMD from the zone between the mined seam and the rider seam. These discharges exist or existed in the vicinity of culverts 2, 3, 4, 6, and 7 along the Pirl Spring Road. There are also discharges from this zone at culverts 8, 9, 10 and the Pirl Spring, but they

are not AMD. (DER Exhibits 33A and 33B).

42. The AMD which flowed to culvert 2 on the Pirl Spring Road flowed from the culverts directly to Buck Run, and the AMD which flowed to culverts 3 and 4, flowed from those culverts to the Buck Run Tributary. (T 54-55).

43. The observable source of the water that flowed to culverts 2 and 3 on January 23, 1980 was a swampy area located below the toe of spoil of the Rogers Mill Strip, in the area of the present location of the MP 5 treatment ponds. This swampy area dried up some time after the treatment ponds were constructed. The volume of these discharges decreased significantly after the toe of spoil AMD collection ditch and the treatment ponds were constructed on MP 5. (T 52, 224-226, 491-492, 495, 501; DER Exhibit 33A).

44. The observable source of the water that flowed to culvert 4 on January 23, 1980 was an area at the toe of spoil of the Rogers Mill Strip in the vicinity of a dead tree above culvert 4. Water continued to flow above ground from the toe of spoil area to culvert 4 until a toe of spoil ditch was constructed by Lawrence. The toe of spoil ditch was originally constructed some time between May 27, 1980 and June 10, 1980. After the construction of the ditch, the flow of water at culverts 3 and 4 was greatly reduced. (T 51-52, 170, 224-226, 491, 495)

45. There is nothing between the sources of the culvert discharges and the culverts which would alter the chemical character of the water. (T 887).

46. DER's file for the Rogers Mill Strip does not indicate that there were any pre-mining pollutional discharges below the Rogers Mill Strip along the Pirl Spring Road. (T 25-28).

47. Lawrence never performed field tests or laboratory tests of the mine drainage at the culverts along the Pirl Spring Road prior to the time DER Inspector Mark Frederick first sampled them. (T 1512-1513, 1642).

48. The water quality at culverts 8, 9, 10, and the Pirl Spring represents background or ambient water quality for the area of the Rogers Mill Strip. (T 499-500).

49. The background water quality concentration for sodium is less than 1 ppm. (T 594-595).

50. On January 23, 1980, Lawrence was not treating the AMD that flowed to culverts 2, 3 and 4 along the Pirl Spring Road. (T 55).

51. On January 23, 1980, parameters sampled in the mine drainage at culvert 4 had the following concentrations (values, except for pH, are hereinafter expressed in milligrams per liter): the pH was 3.2; the acidity of 618 exceeded the alkalinity of 0; iron was 32.3; and manganese was 56. (T 40; DER Exhibits 33, 33A).

52. On January 23, 1980, the parameters sampled in the mine drainage at culvert 3 had the following concentrations: the pH was 3.7; acidity of 891 exceeded alkalinity of 0; and manganese was 140. (T 47; DER Exhibits 33, 33A).

53. On January 23, 1980, parameters sampled in the mine drainage at culvert 2 had the following concentrations: the pH was 4.5; acidity of 150 exceeded alkalinity of 0; and manganese was 41. (T 48; DER Exhibit 33A).

54. On January 23, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2, 3, and 4, and the applicable effluent limit for iron at culvert 4.

55. On January 28, 1980, DER Inspector Frederick inspected the Rogers Mill Strip and was accompanied by Archie Johnson, the foreman at the strip. On that date the discharges at culverts 2 through 4 were flowing but were not sampled. Lawrence was not collecting or treating the discharges on January 28, 1980. (T 71-72).

56. Inspector Frederick inspected the Rogers Mill Strip on February 28,

1980, and was accompanied by Archie Johnson and James Filiaggi, the superintendent of Lawrence's mining operations. (T 73, 1625).

57. On February 28, 1980, Lawrence was not treating the mine drainage flowing to culverts 2, 3, and 4. (T 79).

58. On February 28, 1980, parameters sampled in the mine drainage at culvert 2 had the following concentrations: the pH was 4.5; the acidity of 165 exceeded the alkalinity of 0; and the manganese was 41.7. (T 76; DER Exhibit 35A).

59. On February 28, 1980, parameters sampled in the mine drainage at culvert 3 had the following concentrations: the pH was 3.8, the acidity of 971 exceeded the alkalinity of 0, the iron was 20.6, and the manganese was 130. (T 76-77; DER Exhibit 33A).

60. On February 28, 1980, parameters sampled in the mine drainage at culvert 4 had the following cncentrations; the pH was 2.9, the iron was 81.4, the acidity of 1032 exceeded the alkalinity of 0, and the manganese was 93. (T 75-77; DER Exhibit 33A).

61. On February 28, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2, 3, and 4, and the applicable effluent limit for iron at culverts 3 and 4.

62. On March 20, 1980, DER Inspector Frederick observed mine drainage flowing to culverts 2, 3, and 4. Inspector Frederick did not collect samples for laboratory analysis, but did measure the pH of the discharges at the site on that day. The pH's of all the discharges were less than 4.5. (T 90-91).

63. On March 20, 1980, Lawrence violated the applicable effluent limit for pH at culverts 2, 3, and 4.

64. On May 13, 1980, the mine drainage at culvert 2 was being treated by Lawrence, and it had the following concentrations of these parameters:

the pH was 9.8; the manganese was 32.78; and the TSS was 753. (DER Exhibit 33A).

65. On May 13, 1980, the mine drainage at culvert 3 was being treated by Lawrence, and it had the following concentrations of these parameters: the manganese was 130 and the TSS was 490. (DER Exhibit 33A).

66. On May 13, 1980, the mine drainage at culvert 4 was being treated by Lawrence, and it had the following concentrations of these parameters: the iron was 23.6; the manganese was 52.7; and the TSS was 604. (DER Exhibit 33A).

67. On May 13, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4; the applicable effluent limit for pH at culvert 2; and the applicable limit for iron at culvert 4.

68. On May 21, 1980, Lawrence was not treating the mine drainage at culverts 2, 3, and 4. (T 147).

69. On May 21, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.3; the acidity of 37 exceeded the alkalinity of less than 10; and the manganese was 21.8. (T 148; DER Exhibit 33A).

70. On May 21, 1980, the mine drainage at culvert 3 had the following concentrations of these parameters: the pH was 4.2; the acidity of 145 exceeded the alkalinity of less than 10; and the manganese was 115. (T 149; DER Exhibit 33A).

71. On May 21, 1980, the mine drainage at culvert 4 had the following concentrations of these parameters: the pH was 4.3; the acidity of 830 exceeded the alkalinity of less than 10; and the manganese was 23. (T 149; DER Exhibit 33A).

72. On May 21, 1980, Lawrence exceeded the applicable effluent limits

for pH, acidity, and manganese at culverts 2, 3, and 4.

73. Lawrence admits that some of the mine drainage collected by the toe of spoil collection ditch is from its mining operation. (T 488, 1628, 1632-1633).

74. On June 10, 1980, the mine drainage at culvert 2 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the manganese was 44.7 and the TSS was 112. (T 172-173; DER Exhibit 33A).

75. On June 10, 1980, the mine drainage at culvert 3 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the iron was 5.8; the manganese was 305; and the TSS was 4,150. (DER Exhibit 33A).

76. On June 10, 1980, the mine drainage at culvert 4 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the pH was 5.2; the manganese was 24.2; and the TSS was 178. (DER Exhibit 33A).

77. On June 10, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4; the applicable effluent limit for iron at culvert 3; and the applicable effluent limit for pH at culvert 4.

78. On or about June 20, 1980, Lawrence deepened and extended the toe of spoil collection ditch which was intended to intercept the mine drainage at the dead tree. The toe of spoil collection ditch is in rubbly material and is not impermeable. (T 184, 851; DER Exhibits 14I, J, K, L, M, and N).

79. The second treatment pond was built on MP 5 on or about July 1, 1980. A major portion of the waste that flowed to culverts 3 and 4 was intercepted by the toe of spoil collection ditch and the treatment ponds on MP 5. (T 194, 199, 489).

80. On July 7, 1980, Lawrence was not treating the discharges at culverts 2, 3, or 4. (T 223-224).

81. On July 7, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.4; the acidity of 179 exceeded the alkalinity of 0; and the manganese was 56. (T 223-225; DER Exhibit 33A).

82. On July 7, 1980, the mine drainage at culvert 4 had a very low flow and, as a result, no sample was collected for analysis. However, the mine drainage did have a field pH of less than 4.5. (T 225).

83. On July 7, 1980, Lawrence exceeded the applicable effluent limits for pH at culverts 2 and 4, and the applicable effluent limits for acidity and manganese at culvert 2.

84. On July 22, 1980, Lawrence was treating the discharges at culverts 2, 3, and 4 with sacks full of soda ash briquettes placed in the road ditch. There were no facilities to settle out suspended solids. (T 226-227).

85. On July 22, 1980, notwithstanding that it was being treated, the mine drainage at culvert 2 had the following concentrations of these parameters: the manganese was 28.5 and the TSS was 100. (DER Exhibit 33A).

86. On July 22, 1980, the mine drainage at culvert 3 was being treated, but nevertheless had the following concentrations of these parameters: the manganese was 103 and the TSS was 402. (DER Exhibit 33A).

87. On July 22, 1980, the mine drainage at culvert 4 was being treated, but nevertheless had the following concentrations of these parameters: the pH was 10.1; the manganese was 9.9; and the TSS was 264. (DER Exhibit 33A).

88. On July 22, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4 and the applicable effluent limit for pH at culvert 4.

89. On August 14, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.4; the acidity of 150 exceeded the alkalinity of 1; and the manganese was 49. (T 237-238; DER Exhibit 33A).

90. On August 14, 1980, the mine drainage at culvert 4 had the following concentrations of these parameters: the pH was 4.4; the acidity of 150 exceeded the alkalinity of 8; and the manganese was 19.16. (DER Exhibit 33A).

91. On August 14, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2 and 4.

92. On October 3, 1980, samples of the mine drainage at culverts 2, 3 and 4 were not collected. However, the field pH's for the drainage at culverts 2, 3, and 4 were all less than 5. (T 250).

93. On October 3, 1980, Lawrence exceeded the applicable effluent limit for pH at culverts 2, 3, and 4.

94. In order to effectively treat AMD, it must be neutralized first and then directed to settling basins for the metals to settle out. (T 1621).

95. The treatment which Lawrence provided for the AMD at culverts 2, 3 and 4, by placing soda ash briquettes in the road ditch, and for the dead tree toe of spoil discharge by placing soda ash briquettes in the channel in which it flowed to culvert 4, was not effective to treat the AMD. (T 226-227, 1621).

96. Lawrence constructed a siltation control ditch on the Rogers Mill Strip (MP 5) some time between May 27, 1980 and June 10, 1980. (T 170).

97. Prior to the construction of a siltation control ditch on the Rogers Mill Strip (MP 5), there was an absence of adequate erosion and sedimentation controls at the site. (T 170, 363, 366, 1635-1637).

98. On May 12, 1980, there was a heavy rainfall at the site, which resulted in muddy water running off the site at two places, just above culvert 4 and down the Haul Road; a siltation control ditch would have collected the muddy water and conveyed it to sedimentation basins. (T 95-96; DER Exhibit 7).

99. Buck Run is classified at 25 Pa. Code §93.9 as a high quality cold water fishery.

100. Buck Run is a relatively lightly buffered stream which does not have a great ability to assimilate acid. (T 419-420).

101. Iron contained in AMD has a very negative effect on aquatic life where iron precipitation occurs. Precipitation occurs where the AMD enters a stream and is neutralized. The neutralization of AMD causes the formation of insoluble iron hydroxides which settle out, coat and stain the substrate. The staining interferes with the living space of aquatic organisms on the substrate itself and interferes with the ability of the organisms to exchange oxygen.

102. The acid in AMD is directly toxic to fish and aquatic organisms. It irritates the gills of aquatic organisms which react by secreting a mucus; this interferes with their ability to exchange oxygen and carbon dioxide and they die.

103. Mine drainage with very low pH has the same effect on aquatic organisms as acid. (T 433).

104. Siltation can cause damage to aquatic life in two ways: (i) small amounts of sediment over time could smother a stream's habitat; and, (ii) one high concentration of abrasive sediment could result in an instant fish kill. (T 438).

105. On March 20, 1980, Karl Shaeffer, a water pollution biologist with

DER, conducted a macro-invertebrate study of Buck Run above and below the area affected by drainage from Lawrence's and Marsolino's surface mines. (T 386, 398-403).

106. On March 20, 1980, there was a well established macro-invertebrate community in Buck Run above the area affected by drainage from Lawrence's and Marsolino's surface mining, which community included many taxa of pollution sensitive invertebrates, including mayflies, stoneflies and caddisflies, whereas, in the area near the Buck Run Bridge, the macro-invertebrate community was almost nonexistent and there was iron staining. (T 401-403).

107. The staining observed in Buck Run is iron hydroxide precipitate which occurs commonly when AMD enters a stream and is neutralized; it has an orange tint and is often referred to as "yellowboy." (T 407-408).

108. On May 12, 1980, Buck Run above Lawrence's and Marsolino's mines had clear water and there was no coating (of precipitates) on the substrate, whereas below the mines, the water was turbid and there was visible orange staining on the rocks. (T 101, 114-115).

109. On May 12, 1980, discharges from the Rogers Mill Strip and the MP-27 Strip impacted the water quality of Buck Run and the Buck Run tributary because, even though Lawrence and Marsolino were treating their discharges, they did not employ facilities to settle out the metals and they were precipitating out in the stream. (T 101, 116-117).

110. On May 12, 1980, the total solids level of Buck Run near the Rogers Mill Bridge increased from 142mg/l before a rainstorm to 16,076 mg/l after the rainstorm. (T 120; DER Exhibit 8).

111. On May 21, 1980, the physical appearance of Buck Run showed that it was continuing to be degraded by AMD. The unnamed tributary to Buck Run was very yellow and turbid at its mouth, and Buck Run below both tributaries

was cloudy with iron staining on the substrate. Whereas, upstream of the tributary, Buck Run was very clear. (T 150-151).

112. On July 1, 1980, Lawrence was treating the water at culverts 2, 3 and 4, but did not settle out the metals. (T 198-201).

113. On October 3, 1980, the fish community in Buck Run in the area of the Buck Run Bridge was depressed because of the adverse impact of AMD and siltation, in spite of the fact that that area, with its pools and ripples, is a good habitat for fish. Electrofishing in a 75 yard area upstream from the bridge yielded three trout, whereas, electrofishing in a 75 yard area above the influence of mining yielded approximately seventy-five (75) trout and other associated species. (T 414-416).

114. When DER's water pollution biologist visited Buck Run in March and October, 1980, there was an abrupt change in the aquatic life in Buck Run below the Buck Run tributary as compared to above it. The differences in the aquatic communities of Buck Run downstream and upstream of Lawrence's and Marsolino's mining operations can be attributed to those operations. (T 419, 438).

115. During the period of January 28, 1980 to October 10, 1980, the physical, chemical and biological condition of Buck Run and the Buck Run tributary was degraded by discharges of AMD and sediment from Lawrence's and Marsolino's surface mines; Lawrence contributed to the degradation of Buck Run and the Buck Run tributary. (T inclusive).

116. Buck Run and the Buck Run tributary could not begin to recover until the discharges of AMD and siltation from Lawrence's and Marsolino's operations were eliminated. (T 466).

117. In May of 1981, there was some improvement in the aquatic community and stream quality in the area of Buck Run below the Buck Run

tributary; however, recovery was not complete. Most of the coating of the substrate was washed away. (T 448-454).

118. Between May, 1981 and May, 1982, Buck Run continued to recover in quality; this improvement can be attributed to the corrective measures taken by Lawrence and Marsolino concerning the AMD and siltation from their mining sites. (T 456-458).

119. In 1982, it was estimated that it would take approximately 3 to 5 years for Buck Run to completely recover from the damage that was done in 1980. (T 460-461).

120. Lawrence is the permittee of a surface mining operation in Dunbar Township, Fayette County, which is covered by Mine Drainage Permit 3378BC10 and Mining Permit 1063-8. (The "Spruell Strip") (T 264).

121. On September 4, 1980, Lawrence failed to implement and maintain adequate erosion and sedimentation controls at the Spruell Strip. (T 264, 269).

122. On September 4, 1980, there was a discharge of AMD from the Spruell Strip which had the following concentrations of these parameters: the pH was 2.9; the acidity of 564 exceeded the alkalinity of 0; the iron was 35.8; and the maganese was 5.3. (T 274; DER Exhibit 33).

123. On September 4, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, iron, and manganese in its discharge from the Spruell Strip.

124. Drainage from the Spruell Strip enters a tributary of Morgan Run. (T 274).

DISCUSSION

In this civil penalties action, DER bears the burden of proving by a preponderance of the evidence that Lawrence violated applicable statutes and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §21.101(a); 21.101(b)(1); DER v. Federal Oil and Gas Co. and James V. Joyce, t/d/b/a Joyce Pipeline Co., 1975 EHB 186. DER has met its burden with respect to most of the violations set forth in both DER's complaint and DER's amended complaint. However, before addressing the details of those proven violations, and Lawrence's responsibility for them, we will consider DER's still pending motion to amend its complaint to conform to proof.

Amendment of DER's Complaint

DER's original complaint covered violations which occurred as a result of Lawrence's strip mining operations at three sites in Fayette County, the Rogers Mill Strip, located in Springfield Township and covered by mining permit no. 1063-5; the Spruell Strip, located in Dunbar Township and covered by mining permit no. 1063-8; and the Kennedy Strip, located in Dunbar Township and covered by mining permit no. 1063-7.

At the first hearing, held on June 2, 1982, the parties restated an earlier stipulation which confirmed that this action did not cover alleged violations which occurred as a result of Lawrence's mining operations at the twenty (20) acre area covered by mining permit no. 1063-5(A), which is adjacent to the sixty-three (63) acre area covered by mining permit no. 1063-5. (T 3-6). These two sites are collectively referred to as the Rogers Mill Strip.

Subsequently, during the course of the hearing held on June 3, 1982, DER at first offered to withdraw the portions of its original complaint that dealt with "the other sites [located] in Dunbar Township." (T 265). This

reference was to the sites covered by mining permit nos. 1063-7 and 1063-8, the Kennedy Strip and the Spruell Strip, respectively. However, following an on-the-record dispute between the parties concerning the fact that deletion of the applicable paragraphs of DER's complaint (nos. 18(b) and 27) would not suffice due to their incorporation by reference into other paragraphs of DER's complaint, counsel for DER rescinded the offer to withdraw the aforementioned paragraphs by orally moving the Board to amend the complaint to include them. (T 267). While agreeing with counsel for Lawrence that the violations alleged in paragraphs 18(b) and 27 were de minimis, counsel for DER nonetheless pursued the motion to amend. However, the Board deferred ruling on DER's motion, noting that it would be appropriate for DER to move to amend the complaint to conform to the proof after the proof had been put in the record. (T 268). DER followed the Board's recommendation by filing such a motion on March 28, 1983, four months after the conclusion of the hearings. (Lawrence's answer to DER's motion raises only one ground for denial of DER's motion, namely, the dilatory filing of it.)

In its motion, DER requested the Board to allow amendment of its complaint to cover violations on the sites covered by mining permits 1063-8 and 1063-5(A). The Hearing Examiner, former Board Chairman Harnish, denied DER's motion to amend its complaint concerning permit no. 1063-5(A). (T 509). Furthermore, because DER stipulated on the first day of hearings that this civil penalties action did not cover alleged violations which occurred as a result of Lawrence's mining on the area encompassed by mining permit 1063-5(A), we will not allow DER to renege on that stipulation at this late stage in the proceedings. Therefore, alleged violations related to operations on the area covered by mining permit 1063-5(A) are not at issue herein.

With regard to DER's other proffered amendment, concerning a violation

on September 4, 1980, at the area covered by mining permit 1063-8, the Spruell Strip, we will allow the amendment in view of the fact that DER's original complaint included a count which alleged a violation at the Spruell Strip on September 4, 1980. The only difference between DER's original complaint and its amended complaint, concerning the September 4, 1980 violation at the Spruell Strip, is that DER incorrectly listed Buck Run as the receiving stream in its original complaint. In its amended complaint, DER does not cite a specific receiving stream, but the record indicates that the receiving stream of discharges from the Spruell Strip is a tributary of Morgan Run. (See Finding of Fact No. 123).

Our grant of the amendment concerning the Spruell Strip violation on September 4, 1980 comports with Pa. R.C.P. No. 1033[1] which provides:

> [a] party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted. (emphasis added).

It is well-settled in Pennsylvania that a court has the discretion to grant amendments to pleadings and that it should be liberally exercised except where surprise or prejudice to a party would result. Biglar v. Biglar, 330 Pa. Super. 512, 479 A.2d 1021, 1024-26 (1984). In the instant case, Lawrence had notice, by virtue of DER's original complaint, of the September 4, 1980 violation at the Spruell Strip; thus, the element of surprise is not present. Allowance of DER's amendment, changing Buck Run to waters of the Commonwealth,

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[1] With regard to pleadings, the Pennsylvania Rules of Civil Procedure are made applicable to proceedings before the Board by virtue of the Board's rules of practice and procedure. 25 Pa. Code §21.64.

does not prejudice Lawrence for the reasons noted above.

Finally, with regard to amendments of DER's complaint, we note that DER has not moved the Board to amend the complaint to conform to the proof concerning an alleged violation which occurred at the area covered by mining permit no. 1063-7, the Kennedy Strip. Therefore, because of that omission, the alleged violation at the Kennedy Strip is not at issue herein.

Basis for Liability

This civil penalties action has been brought by the Department pursuant to Section 605 of the CSL; more specifically, it has been brought pursuant to the version of the CSL which was in effect prior to the amendment of the statute by Act 157 of 1980, since the violations complained of occurred prior to October 10, 1980, the effective date of Act 157. All provisions of the CSL cited in this adjudication will be those in effect at the time of the violations.

Section 605 provided, in part, that:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

The Department has alleged that Lawrence violated §§3, 301, 307, 315, and 401 of the CSL and the rules and regulations adopted thereunder at 25 Pa. Code §§77.92, 95.1, 99.33 and 102.4.

Section 3 of the CSL generally declared that the "discharge of...

industrial waste...into the waters of this Commonwealth,... which causes or contributes to pollution as herein defined or creates a danger of pollution is hereby declared...to be a public nuisance." Section 301 stated

> No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

Industrial waste was defined in §1 of the CSL to include mine drainage. The conditions placed upon mine drainage discharges were set forth in §§307 and 315. Section 307 generally imposed conditions upon the discharge of industrial waste:

> No person...shall discharge, or permit the discharge of industrial wastes in any manner directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the board or such person has first obtained a permit from the department... A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance.

Section 315 of the CSL dealt more specifically with the operation of mines, providing that:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department...

And, Section 401 of the CSL proscribed the discharge of "any substance of any kind or character resulting in pollution..."

The regulations contained at 25 Pa. Code §§77.92, 95.1, and 99.33 contain effluent limitations applicable to coal mining activities. Section 95.1, which contains general treatment requirements for all wastewater discharges, states that wastewater discharges are subject to the treatment

requirements established pursuant to §§301 and 304 of the Clean Water Act, 33 U.S.C. §§1311 and 1314 and also to those treatment requirements set forth in Title 25. The treatment requirements established under the Clean Water Act were contained at 40 C.F.R. 434.32(a) and provided the following:

> Total iron - 7 mg/l maximum and 3.5 mg/l for a 30 day average
> Total manganese - 4 mg/l maximum and 2 mg/l for a 30 day average
> Total suspended solids - 70 mg/l maximum and 35 mg/l for a 30 day average
> pH - within the range 6.0 to 9.0

The effluent limitations to which mine drainage discharges were subject under Title 25 were set forth at §77.92 and 99.33.[2] Section 77.92(c) provides in pertinent part:

> Water Quality Criteria
>
> 1. The permittee shall take all necessary precautions to prevent the discharge of avoidable silt, coal mine solids, rock debris, dirt and clay into the receiving stream as required by the current Erosion and Sediment Control Regulations of the Department.
>
> 2. The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than six (6.0) or greater than nine (9.0).
>
> 3. The permittee shall at no time discharge to the waters of the Commonwealth mine drainage containing a concentration of iron in excess of seven (7) milligrams per liter.
>
> 4. The permittee at no time shall discharge to the waters of the Commonwealth mine drainage the acid content of which, as determined by a pH value of eight (8.0) by the hot phenolphthalein test exceeds its alkaline content as determined to pH of four (4.0) by the bromphenol blue test.

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[2] Both of these regulations as applied to coal mining operations have since been repealed.

Section 99.33 provided:

> (a) Acid. There shall be no discharge of mine drainage which is acid.
> (b) Iron. There shall be no discharge of mine drainage containing a concentration of iron in excess of seven milligrams per liter.
> (c) pH. The pH of discharges of mine drainage shall be maintained between 6.0 and 9.0.
> (d) Exceptions. The Board shall grant an exception to any of the limitations in subsections (a)-(c) of this section only when the operator has affirmatively demonstrated that operation under the proposed exception would not cause pollution to waters of this Commonwealth.
> (e) Specific limitations. At the request of the reporting agency, or on its own motion, the Board may require more stringent requirements than those listed in subsections (a)-(c) of this section including specific limitations as to other constituents of mine drainage, such as aluminum, sulphates, manganese and the like.

Section 102.4 relates to erosion and sediment control and provides in relevant part:

> (a) All earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, except as provided in subsection (b) of this section, any landowner, person, or municipality engaged in earth-moving activities shall develop, implement, and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation.

The Department has also urged that §316 of the CSL is applicable to this proceeding. At the time of these alleged violations, §316 provided, in part, that:

> Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the board <u>may order</u> the landowner or occupier to correct the condition in a manner satisfactory to the board or <u>it may order</u> such owner or occupier to allow a mere operator or other person or agency of the Commonwealth access to the land to take such action. (emphasis added).

Section 316 does indeed provide a separate basis for liability, <u>Commonwealth</u>

v. Barnes and Tucker Company, 453 Pa. 392, 400, 319 A.2d 871, 876 (1974), but in this case the Department has chosen to proceed by way of a complaint for civil penalties, rather than the issuance of an order pursuant to §316. Consequently, our decision is not based upon §316 considerations.

There are several legal principles under which Lawrence may be held responsible for the discharges in question. Lawrence is responsible for all mine drainage which originates on or flows through its permitted area. Commonwealth v. Harmar Coal Co. 452 Pa. 27, 306 A.2d 308 (1973) and Hawk Contracting, Inc. and Adam Eidemiller, Inc. v. DER, 1981 EHB 150. And, Lawrence is responsible for all discharges of mine drainage which were either caused or affected by Lawrence's mining operations. Hawk Contracting, Inc., supra, and Adam Greece d/b/a Cherry Run Fuel Company v. DER, 1980 EHB 135. Our review of the voluminous record indicates that DER established that Lawrence was responsible for the discharges from the Rogers Mill and Spruell strips under either or both of these principles and did commit the cited violations on the noted dates.

Regarding Lawrence's responsibility for discharges from its permitted area, it has been established that from January 23, 1980, until the second treatment pond was built on MP 5 on or about July 1, 1980, the discharges which were sampled at culverts 2 and 3 originated in the swampy area that was either on or very near to the boundary of the permit area. Also, prior to construction of the toe of spoil AMD collection ditch by the dead tree on MP 5, the dead tree discharge flowed above the ground from the point on the strip where it surfaced at the toe of spoil to culvert 4. After the construction of the MP 5 ponds and the toe of spoil ditch, the flows at culverts 2, 3 and 4 were greatly reduced, but not eliminated. Reduced amounts of AMD continued to discharge at these points because the treatment

ponds and the toe of spoil ditch were not impermeable and because the toe of spoil ditch was not deep enough to intercept all the AMD which flows towards the Pirl Spring Road from the area mined by Lawrence. Since all the AMD discharges at culverts 2, 3 and 4 originated on Lawrence's site, Lawrence was responsible for abating or collecting and treating them. Lawrence is similarly responsible for the September 4, 1980, discharge from the Spruell Strip.

Lawrence is also responsible for all discharges emanating on or off its mining site which were either caused or affected by Lawrence's mining operations if a causal connection can be established between Lawrence's operations and the discharges. There is no dispute in the testimony that the Rogers Mill Strip produces AMD. Furthermore, a causal connection between Lawrence's operations and the discharges is established by both direct and circumstantial evidence. The discharges at culverts 2, 3 and 4 originated on the Lawrence site. A causal connection after the construction of the toe of spoil ditch and the second MP 5 treatment pond exists because these structures were not impermeable and because the toe of spoil ditch was not dug deep enough to intercept all the AMD flowing from the Rogers Mill Strip towards the Pirl Spring Road because it was not dug all the way to the rider seam. The fact that the flows decreased at culverts 2, 3 and 4 after construction of the toe of spoil ditch and the second treatment pond on MP 5 is evidence of a hydrologic connection between the discharges at the culverts and the site, as the ditch and ponds are between the structures and the discharges. If there were no hydrologic connection, the flows at the culverts would not have been reduced. Some flow continues at the culverts because the ponds and ditch do not intercept and hold all the AMD which flows from the site towards the culverts.

The discharges at culverts 2, 3 and 4 are AMD and there is no other logical source of AMD which would flow to those culverts, except the surface mines at Lawrence's Rogers Mill Strip and Marsolino's MP-27 Strip. There are no other active or abandoned surface or deep mines in the recharge areas for the culverts. There are not any oil or gas wells in the area, and the water quality does not represent ground water contaminated by oil or gas wells. Finally, the quality of the discharges at culverts 2, 3 and 4 is not consistent with ambient water quality in the area. The sulfates in the culvert discharges, as well as the high acidity, manganese and aluminum distinguish it from the ambient water quality which is represented by the water at culverts 8, 9, 10 and the Pirl Spring and, to some extent, by the water in the drill holes above the highwall.

An additional indication that the water quality of the culvert discharges changed after mining commenced is the change in the quality of Buck Run and Buck Run Tributary in the area which received drainage from the culverts. Before mining, the area was a high quality trout stream which was stocked by the Fish Commission. After mining commenced, the stream became degraded and was no longer stocked. After Lawrence and Marsolino improved their collection and treatment of the discharges, the water quality in the streams improved. If the discharges had been bad prior to mining, Buck Run and the Buck Run Tributary would have been degraded before mining.

Hydrogeological evidence also establishes a causal connection between the discharges and Lawrence's operations. Drainage was occurring through or over the crop line barrier of the mined seam, which was probably not intact, and then ultimately to the culverts. Groundwater is flowing toward the fractured, rubbly area and out at the culverts. There is also evidence that AMD is migrating vertically.

Lawrence has asserted that if civil penalties are to be imposed under §605 of the CSL, any asserted violations under §401 are merged into and with the §605 provisions, such that separate civil penalties are inappropriate under Section 401. The basis of Lawrence's argument is that violations of Sections 307 and 315 of the CSL and of Section 401 are "different ways of saying the same thing." (Appellant's Post-Hearing Brief, p. 52). DER argues that violations encompassing discharges are distinct and different from violations for polluting. (Commonwealth's Reply to Post-Hearing Brief of Lawrence Coal, p. 5, 6). We are of the opinion that the attempt by Lawrence to invoke the doctrine of merger in this appeal by the linkage of the word "pollution" to the various sections of the CSL which DER maintains have been violated is an unreasonable interpretation of those sections. (See discussion in Lawrence's Post-Hearing Brief at p. 52). While the violation of the terms and conditions of a permit, and therefore, in this case, §§307 and 315 of the CSL, may result in pollution of the waters of the Commonwealth, there is a separate reason for the creation and administration of a permit system. In regulating an activity through a permit system, one seeks to prevent the occurrence of pollution by prescribing various conditions for the undertaking of the activity. The regulator also seeks to impose uniform conditions, wherever possible, on similar activities. Section 401 is a broad proscription against any pollution, no matter what the source or no matter whether the substance is regulated through a permit program. Thus, the violations of §§307 and 401 are separate violations.

Lawrence has also asserted that Section 401 of the CSL is, by definition, an improper basis for the imposition of civil penalties in this appeal since Section 401 applies to <u>other</u> pollutions than industrial wastes. (Appellant's Post-Hearing Brief, p. 52). It is apparent that Lawrence's

entire reliance upon this argument is based upon the heading of Section 401, which reads "Prohibition against other pollutions." We cannot accept such a basis as propounded by Lawrence in light of the language of the section. The operative language of Section 401 is "...any substance of any kind or character..." Such language is not limited as argued by Lawrence. Assuming that because of the discrepancy between the heading of this statutory section and its substantive language, that the section is somehow not explicit or unclear, the tenets of statutory construction provide aid in interpretation. Initially, §1924 of the Statutory Construction Act, 1 Pa. C.S.A. §1924, provides, in pertinent part, that ". . . The headings prefixed to titles, parts, articles, chapters, sections, and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof." The title of Section 401 in and of itself provides no particular aid in construction, so resort to legislative intent is necessary. Section 1921(c)(5) of the Statutory Construction Act, 1 Pa. C.S.A. §1921(c)(5), notes that "The former law, if any, including other statutes upon the same or similar subjects" may be consulted. Before the 1970 amendments to the CSL, §401 contained the following language "Nothing contained in this section shall be construed to apply to any sewage or industrial waste the discharge of which is regulated or prohibited by the preceding sections of this act. . ." That language was expressly deleted in 1970. Since mine drainage is, and even then, was a species of industrial waste, we hold that the General Assembly's intent in 1970 was to broaden the application of Section 401.

Before we assess civil penalties, we will address the various issues concerning the total number of Lawrence's violations.

Lawrence's Violations

DER urges the Board to assess civil penalties against Lawrence for

so-called continuing violations, i.e., violations which allegedly can be inferred to occur over a period of time on the basis of observations of those violations on a number of days during the relevant time period.

The Board held in DER v. Medusa Corporation, 1978 EHB 149, that no civil penalties could be assessed for a continuing violation of the weight rate standard under the Air Pollution Control Act and 25 Pa. Code §123.13 in the absence of test data to support the inference of a continuing violation. We believe that the latter holding in Medusa concerning continuing violations is applicable to the circumstances presented herein. As DER's own witnesses testified, the characterization of mine discharges as AMD involves sampling and scientific analysis to determine the various levels of different parameters--pH, acidity, iron, manganese, aluminum, total suspended solids--which indicate that AMD is indeed present. DER sampled the discharges in question on January 23, February 28, March 20, May 13, May 21, June 10, June 20, July 7, July 22, August 14 and October 3, 1980. We believe that this sampling was sufficiently connected in time to establish the existence of continuing violations from January 28 to October 3, 1980. The sampling intervals were 36, 21, 54, 8, 20, 10, 17, 15, 23, and 50 days respectively. Over successive months, the exceedance of the applicable effluent limits was both substantial and consistent, so as to indicate the generation of AMD. Therefore, Lawrence will be assessed civil penalties for causing continuous unlawful discharges of AMD from culverts 2, 3, and 4 at the Rogers Mill Strip from January 23, 1980 to October 3, 1980, a period of 254 days.

An obvious continuing violation can also be inferred from Lawrence's failure to implement and maintain adequate erosion and sedimentation controls on the Rogers Mill Strip (MP 5) by delaying the construction of a siltation control ditch until at least May 27, 1980 (see Findings of Fact Nos. 44, 96

and 97). Lawrence's violation of DER's rules and regulations concerning adequate erosion and sedimentation controls is not the type of violation, as is true with AMD discharges, which needs to be observed and then verified by sampling and scientific analysis. Rather, DER's observations showed that the flow of AMD discharges to culverts 3 and 4 was greatly reduced after Lawrence constructed the siltation control ditch. (See Findings of Fact No. 44). We hold specifically that Lawrence's failure to construct the siltation ditch until June 10, 1980--after DER notified Lawrence on February 28, 1980 of the violation (T 363)-- constituted a continuing violation of 25 Pa. Code §102.4(a) for that time period (104 days). The willfulness aspect of this violation will be discussed infra.

Lawrence is also subject to civil penalties for the violations which occurred as a result of its mining activities on the Spruell Strip. Specifically, these include a failure to implement and maintain adequate erosion and sedimentation controls on September 4, 1980, and a discharge of AMD on the same date. (See Findings of Fact Nos. 121 and 122).

Finally, Lawrence is subject to civil penalties for its failure to provide settling basins on May 12, 1980 and July 1, 1980 (see Findings of Fact Nos. 109 and 112). Also, it should be noted that there was testimony indicating that Lawrence failed on two occasions to dispose of pit rejects in accordance with Special Condition 29 of the mining permit. These two violations will not serve as a basis for civil penalties since DER's complaint is deficient with respect to the date of violation and the permit area. DER's amended complaint does not cure this defective pleading, and DER has not moved the Board to amend the complaint to conform to proof with regard to this issue.

Lawrence has no liability for civil penalties for causing the AMD

discharges at culvert 1 since DER admits that the sole source of these discharges was the sediment pond located on the area covered by mining permit no. 1063-5(A). (DER's brief, pp. 44, 49; DER's reply brief, p. 5). Violations which occurred as a result of Lawrence's mining activities on the area covered by mining permit no. 1063-5(A) cannot form the basis for assessment of civil penalties herein due to our holding supra which disallowed DER's motion to amend its complaint to include the area covered by mining permit no. 1063-5(A). In addition, Lawrence has no liability for civil penalties herein for causing the AMD discharges at culvert 5 due to the fact that DER indicated at the hearings that it was not seeking civil penalties for these discharges. (T 1114, 1118). Also, former Board Chairman Harnish, who presided over the hearings, ruled that the AMD discharges at culvert 5 would not serve as the basis for assessing civil penalties. (T 1120, 1122-23, 1126).

To summarize, Lawrence is subject to civil penalties for a total number of 362 violations. This figure is composed of the following: 254 violations associated with unlawful AMD discharges at culverts 2, 3 and 4; 104 violations for the continuing violation of failing to construct a siltation control ditch for 104 days; two violations for failure to settle out metals on May 12, 1980, and July 1, 1980;[3] and, two violations for the AMD discharge and inadequate erosion and sedimentation controls at the Spruell Strip (MP 1063-8) on September 4, 1980. We turn now to a consideration of the factors which guide us in the assessment of civil penalties for these violations.

Civil Penalty Factors

[3] DER seeks a civil penalty for Lawrence's failure to settle out metals on only two dates, even though the evidence indicates that Lawrence's failure in this regard was continuous, at least up until the time when settling basins were constructed. However, we are bound by the specific counts of DER's complaint.

Section 605 of the CSL authorizes the assessment of a civil penalty of up to $10,000 per day per violation and states that the assessment of civil penalties should be guided by consideration of the following factors: "the wilfullness [sic] of the violation, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors." It should be noted that DER has presented no evidence concerning cost of restoration. Therefore, since we cannot speculate as to such costs, this factor will be disregarded. However, there is ample evidence in the record concerning the other factors and we will consider each factor in relation to the above violations. In addition, the Board has used the catchall phrase "other relevant factors" to include the important factor of deterrence of violations by the defendant or others similarly situated. DER v. Jefferson Township, 1978 EHB 134. We will also consider that factor in assessing civil penalties against defendant Lawrence.

With the exception of the AMD discharge from the Spruell Strip into Morgan Run, all the other AMD discharges and erosion and sedimentation violations impacted Buck Run and its unnamed tributary. Although there are indications that Buck Run and its unnamed tributary were polluted from another source,[4] this fact does not serve as a defense to an action for civil penalties. DER v. Rushton Mining Company, 1976 EHB 117. Section 606 of the CSL specifically empowers the Department to proceed against a discharger

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[4] The other source was Marsolino Coal and Coke, Inc., which operates a number of strip mining sites, one of which is adjacent to and immediately uphill of Lawrence's Rogers Mill Strip. DER filed a complaint for civil penalties against Marsolino on February 25, 1981, the same date the complaint at issue herein was filed. DER v. Marsolino Coal and Coke, Inc., EHB Docket No. 81-020-CP-H. On August 18, 1982, the Board approved the settlement of DER's complaint against Marsolino.

even though the receiving stream has been polluted from other sources. Commonwealth v. Gilpin, 52 Pa. Cmwlth. 414, 415 A.2d 1002 (1980).

DER argues that the damage to or injury to the waters of the Commonwealth consisted of degradation of the physical, chemical and biological quality of Buck Run--a high quality, cold water fishery. Lawrence argues that DER's water quality samples indicate that no chemical degradation occurred. Further, with regard to DER's allegation concerning biological and physical degradation, Lawrence's expert biologist testified that the evidence did not support such an allegation. Although some DER water samples could be interpreted in the manner Lawrence suggests, the overwhelming majority of those samples indicate that the physical, biological and chemical qualities of Buck Run and its unnamed tributary were degraded as a result of the AMD discharges and erosion and sedimentation violations. Furthermore, the fish population in the area was depressed as a result of Lawrence's discharge. (See Findings of Fact Nos. 113 and 114). Consequently, at least moderate damage to the waters of the Commonwealth occurred.

Concerning the factor of wilfulness of the violation, the Board has in the past noted the different degrees of wilfulness and the fact that the amount of the civil penalty should reflect the degree of wilfulness of the violator. DER v. Jefferson Township, supra, and DER v. Rushton Mining Company, supra. As the Board stated in Rushton:

> Without binding the Board to tort law (where the law has developed to deal with direct injuries to the person rather than the environment), that law does provide an analysis of the degrees of knowing or wilful conduct that is useful in considering this element for purposes of civil penalties. For instance, there is clearly a difference between deliberate, intentional acts, which are the most "wilful," see, e.g., Evans v. Philadelphia Transit Company, 418 Pa. 567, 573-74 (1965); and accidental, unintentional, unknowing negligence, which is in no sense wilful. See Restatement of Torts, 2nd Vol. 2, 282. In between, are

> degrees of negligence or misconduct with varying degrees of knowledge attached, which may make an act more or less wilful, although not amounting to "wilful misconduct" in tort law. Thus, although an act may not be wilful in the deliberate or intentional sense, there may be a degree of wilfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act.

DER v. Rushton Mining Company, 1976 EHB at 132-33. (Emphasis added). The Board has recently further construed the concept of wilfulness in Refiners Transport and Terminal Corp. v. DER, EHB Docket No. 84-132-G (adjudication issued May 14, 1986) and Southwest Equipment Rental Inc. v. DER, EHB Docket No. 83-175-M (adjudication issued May 14, 1986). There are essentially three degrees of wilful conduct--intentional, reckless, and negligent, which are distinguished by a person's recognition that his conduct may result in a statutory violation.

DER argues that Lawrence engaged in wilful conduct when it allowed the untreated and/or inadequately treated AMD to discharge into Buck Run and its unnamed tributary. However, Lawrence argues that there can be no wilful conduct when Lawrence contested from the outset DER's determination (through its mine inspector) that Lawrence was responsible for the AMD discharges at the culverts. Although Lawrence's argument admittedly has some appeal at first blush, it does not withstand sustained scrutiny. After all, wilful conduct does not miraculously cease to be of that character by virtue of the fact that the violator disclaims responsibility. If that were so, and since nearly all violators disclaim responsibility, there would never be any wilful conduct.

Rather, wilful conduct, as stated in Rushton, supra, can be said to involve knowing the likely consequences of a certain course of action--one which need not be related to whether or not the putative violator accepted

DER's determination of responsibility. As the Board stated in Rushton:

> Respondent [Rushton] could have ceased to mine until it developed a reliable means for treating its acid mine drainage or at least learned of a satisfactory treatment process from other sources. Instead, Rushton quite naturally chose to proceed with mining and to develop an adequate treatment process on something of a tried [sic] and error basis--with the consequent risk that discharges in violation of the permit limitations might very well occur. This is not to say that such violations were wilful in the most intentional sense. However, there is some sense in which Rushton knowingly chose to take the consequences of likely discharges to the waters of the Commonwealth in violation of its permit.

Rushton, supra, 1976 EHB at 134. Rushton's conduct was reckless in the sense that it was aware that its treatment method was not likely to be effective and still went forward. The circumstances which were present in Rushton are sufficiently analogous to the circumstances presented herein, since the record indicates that Lawrence continued mining and treating with soda ash briquettes after DER notified Lawrence of the ineffectiveness of Lawrence's treatment process. (T 71-73). Thus, with regard to the continuing unlawful AMD discharges from the Rogers Mill Strip, Lawrence engaged in reckless conduct.

The same analysis of wilfulness is applicable to the erosion and sedimentation violations. Clearly, Lawrence knew that it was required to build siltation control ditches. Also, notwithstanding Lawrence's contrary statements, it certainly must have been aware that use of roads as a substitute for the requisite siltation control ditches possibly would not adequately serve the purpose for which they were intended, but nevertheless chose to disregard that possibility. That is, at the very least, Lawrence knew that the likely consequences of its use of the roads as siltation control ditches would be inadequate erosion and sedimentation controls. The record does indicate, as was true with the AMD discharges and Lawrence's inadequate

treatment of them, that DER informed Lawrence that siltation control ditches had to be installed. (T 72-74). This notification was given on February 28, 1980. Thus, for the 104-day period during which Lawrence failed to have adequate erosion and sedimentation controls in place, Lawrence's delay in beginning construction of a siltation control ditch amounted to intentional conduct, wilful conduct of the highest degree for the period from February 28, 1980 until May 27, 1980--89 days of the 104-day period of the aforementioned continuing violation of failing to maintain adequate erosion and sedimentation controls. Thus, Lawrence is liable for greater civil penalties for this 89-day period due to the intentional character of its conduct.

Finally, the remaining civil penalty factor we must consider is the factor of deterrence. DER correctly points out that the Board has in the past based the assessment of civil penalties upon, inter alia, the factor of deterrence of the violator and others similarly situated. Moreover, Commonwealth Court has approved of the Board's consideration and use of this factor. Trevorton Anthracite Co. v. DER, 42 Pa. Cmwlth. 84, 400 A.2d 240 (1979). In addition, the Board has, on at least one occasion, assessed civil penalties solely upon the basis of the deterrence factor. DER v. Federal Oil and Gas Co. and James V. Joyce, t/d/b/a Joyce Pipeline Co., 1975 EHB 186. In summarizing its civil penalties assessment in Federal Oil and Gas, the Board stated:

> We are mindful, however, that the imposition of civil penalties also functions as a deterrent. Recognizing the need to protect the trout streams of the Commonwealth and to discourage even minimal pollution of them, we feel the violations here require the imposition of civil penalties if for no other purpose than to remind the Defendants and others engaged in the well drilling business that they must take all necessary and diligent precautions to assure that their activities do not result in any discharges into the waters of the Commonwealth. Accordingly, basing its determination solely on the deterrent value of the penalties, the Board

> assesses penalties in this case as follows: $1,000.00 for the initial discharge of industrial wastes under Count One of the Complaint, plus $100.00 per day for the continuous discharges of drilling fines and/or observed oil on November 19, 20, 23, 24 and 25, 1973, or a total of $1,500.00 to be assessed against Federal individually.

Federal Oil and Gas, supra, 1975 EHB at 198.

The principle set forth above offers us guidance in our assessment of civil penalties based upon their deterrent effect. When a high quality, cold water fishery has been degraded as a result of both unlawful AMD discharges and inadequate erosion and sedimentation controls, we believe that a portion of the civil penalties assessed must necessarily include an amount attributable to the value of deterrence.

Computation of the Amount of Civil Penalties

Having enunciated these standards for assessment of civil penalties, we proceed to apply them in the assessment of the civil penalty. Because the Board itself must determine the amount of civil penalty under §605 as it existed prior to the 1980 amendments to the CSL, we have only the language of §605 of the CSL and prior precedent to guide us, unlike in Refiners Transport and Terminal, Inc., supra, where DER initially assessed the civil penalty based on an internal policy. Section 605, as noted supra, permitted the assessment of a civil penalty of up to $10,000 per day per violation, which, if applied to the continuing discharges of AMD from culverts 2, 3, and 4 would lead to the assessment of a maximum penalty of at least $2,590,000 for the discharges alone.

We have determined that the discharges from culverts 2, 3 and 4 were continuing for a period of 254 days, that they were reckless, and that they resulted in moderate damage to a high quality, cold water fishery. We will assess a penalty of $500 per violation, or a total penalty of $127,000. We

will assess a civil penalty of $100 per violation for Lawrence's two violations for failure to settle out metals since we believe they are extremely minor in comparison to the AMD discharges.

Lawrence's failure to construct and maintain erosion and sediment controls at the Rogers Mill Strip has been held to be a continuing violation for a period of 104 days, 89 days of which were intentional. It, too, resulted in moderate damage to a high quality, cold water fishery. We will assess a penalty of $250 per day for the first 89 days and a penalty of $50 per day for the last 15 days, or a total of $23,000.

For the violations at the Spruell Strip, a penalty of $500 will be assessed for the unlawful AMD discharge and $100 for failure to provide adequate erosion and sediment controls.

In summary, then, defendant Lawrence Coal Company is hereby assessed the following civil penalties for the aforementioned violations of the CSL:

Rogers Mill Strip	
Unlawful discharges of AMD (254 violations)	$127,000
Failure to provide adequate erosion and sediment controls (89 violations)	22,250
Failure to provide adequate erosion and sediment controls (15 violations)	750
Failure to settle out metals (2 violations)	100
Total for Rogers Mill Strip	$150,100
Spruell Strip	
Unlawful discharge of AMD	$ 500
Failure to provide adequate erosion and sediment controls	100
Total for Spruell Strip	600
TOTAL	$150,700

Conclusions of Law

1. The Environmental Hearing Board has jurisdiction over the parties to and the subject of this appeal. 71 P.S. §510-21.

2. This civil penalties action is authorized by Section 605 of the CSL. 35 P.S. §691.605.

3. DER has the burden of proving by a preponderance of the evidence that Lawrence violated applicable statutes and regulations and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §§21.101(a); 21.101(b)(1); DER v. Federal Oil and Gas Co. and James V. Joyce, t/d/b/a Joyce Pipeline Company, 1975 EHB 186.

4. In determining the amount of civil penalties to be assessed in an action brought pursuant to the Clean Streams Law, the Board must consider:

(i) the wilfulness of the violation; (ii) the damage or injury to the waters of the Commonwealth or their uses; (iii) cost of restoration; and, (iv) other relevant factors. 35 P.S. §691.605.

5. The AMD discharges at culverts 2, 3 and 4 emanate from Lawrence's mining operations at the Rogers Mill Strip.

6. Buck Run and its unnamed tributary are waters of the Commonwealth. 35 P.S. §691.1.

7. Lawrence's discharges from culverts 2, 3 and 4 constituted violations of Sections 3, 301, 307, 315, and 401 of the CSL.

8. During the time covered by DER's complaint, Lawrence's surface mining operations were subject to 25 Pa. Code §77.92(c) (since repealed) 25 Pa. Code §95.1, 25 Pa. Code §99.33 (since repealed) (collectively "the effluent limits") and 25 Pa. Code §102.4(a).

9. The analyses of the samples collected by DER at culverts 2, 3, and 4 on January 23, February 28, March 20, May 13, May 21, June 10, June 20, July 7, July 22, August 14, and October 3, 1980 establish a continuing violation of the effluent limits from January 23 to October 3, 1980. DER v. Medusa Corporation, 1978 EHB 149.

10. Lawrence's discharge of AMD from culverts 2, 3, and 4 evidences reckless conduct. DER v. Rushton Mining, 1976 EHB 117, and Refiners Transport and Terminal Corp. v. DER, EHB docket No. 84-132-G (adjudication issued May 14, 1986).

11. From February 28, 1980, to May 27, 1980, Lawrence intentionally failed to implement and maintain adequate erosion controls at the Rogers Mill Strip in violation of 25 Pa. Code §102.4.

12. From May 28, 1980, to June 10, 1980, Lawrence failed to implement and maintain adequate erosion controls at the Rogers Mill Strip in violation

of 25 Pa. Code §102.4.

13. On May 12, 1980, and July 1, 1980, Lawrence failed to settle out metals at the Rogers Mill Strip in violation of §§301, 307, and 315 of the Clean Streams Law and 25 Pa. Code §§77.92(c), 99.33, and 95.1.

14. On September 4, 1980, Lawrence discharged AMD from the Spruell Strip into a tributary of Morgan Run in violation of §§301, 307, 315 and 401 of the CSL and 25 Pa. Code §§77.92(c), 99.33, and 95.1.

15. On September 4, 1980, Lawrence failed to provide adequate erosion and sediment controls at the Spruell Strip in violation of §402 of the CSL and 25 Pa. Code §102.4(a).

16. DER met its burden of proving by a preponderance of the evidence that defendant Lawrence was responsible for the above violations of the CSL and the rules and regulations adopted thereunder and that imposition of civil penalties by the Board was appropriate.

ORDER

AND NOW, this 27th day of May , 1986, civil penalties are hereby imposed upon Lawrence Coal Company in the amount of $150,700 for violations of the CSL and the rules and regulations adopted thereunder.

The entire civil penalty is due and payable into the Clean Water Fund immediately. The Prothonotary of Fayette County is hereby ordered to enter this penalty as a lien against any property of Lawrence Coal Company, with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Diana Stares, Esq./Western

For the Appellant:
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DATED: May 27, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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HEPBURNIA COAL COMPANY :

:

: Docket No. 85-309-G

: Issued: May 28, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Edward Gerjuoy, Member

Syllabus

This consolidated appeal is sustained in part and dismissed in part. The Board dismisses the portion of the appeal directed at DER's alleged refusal to process pending mining permit applications; appellant has waived its right to argue the issues associated with DER's alleged refusal to act. The Board dismisses the portion of the appeal which concerns appellant's duty to treat two of three acid discharges; appellant has admitted that it is responsible for these two discharges. The appeal is sustained, however, to the extent that it concerns appellants' responsibility for the third such discharge; DER failed to meet its burden of showing that appellant should be held responsible for the same.

DER bears the burden of proof in appeals of compliance orders pursuant to 25 Pa. Code §21.101(b)(3). 25 Pa. Code §21.101(d) is not applicable to shift the burden to the appellant. Although it is undisputed that environmental damage is present, the appellant is neither a party actually in possession of the facts relating to such damage nor is it a party who should be in possession of such facts, given the history of this case and the nature of the facts which are relevant to the damage. The record established by DER is insufficient to establish the requisite hydrogeologic connection between the pollutional discharge at issue and the mining activities of appellant; therefore, DER's order regarding this discharge was an abuse of its discretion.

The Frye test, governing the admissibility of scientific evidence, is met with regard to the admissibility of electrical resistivity studies. The manner in which such studies were conducted goes to the weight of the evidence, however, and not its admissibility.

FINDINGS OF FACT

1. The Appellant is Hepburnia Coal Company, Inc., ("Hepburnia") a corporation engaged in the mining and sale of coal with its principal place of business located at R.D. No. 1, Grampian, Clearfield County, Pennsylvania.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer the provisions of the Surface Mining Conservation and Reclamation Act, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), and of the Clean Streams Law, as amended, 35 P.S. §691.1 et seq. ("CSL").

3. On or about July 16, 1985, DER issued a compliance order to Hepburnia, ordering Hepburnia to treat the discharges (identified as Discharges A, B and C) in the vicinity of Hepburnia's Laurel Branch No. 1 mine, in Brady Township, Clearfield County, Pa. (the "mine").

4. Hepburnia's timely appeal of this compliance order has been docketed at EHB Docket No. 85-309-G.

5. Hepburnia also has appealed, at Docket No. 85-343-G, DER's alleged decision — when the aforesaid compliance order was issued — to stop processing various permit applications Hepburnia previously had filed.

6. In an Order dated September 6, 1985, the appeals at Docket Nos. 85-309-G and 85-343-G were consolidated under the single 85-309-G Docket Number.

7. The full hearing on the merits of this consolidated appeal, originally scheduled for September 1986, was expedited to the period October 8 -11, 1985.

8. At the hearing on the merits, Hepburnia conceded that it was responsible for -- and did not challenge DER's order to treat — Discharges B and C (Finding of Fact 3; Tr. 22, 27).[1]

9. Hepburnia mined four distinct areas in the vicinity of Discharges A, B and C (Tr. 17, 589; DER Ex. 1; Hep. Exs. J, K).

10. For the purposes of this appeal, the relevant area affected by Hepburnia consists of about 120 acres on the north-northeastern portion of the areas mined (Tr. 116; DER Exs. 2, 13); these 120 acres hereinafter will be termed "the site".

11. Two major coal seams were mined, hereinafter the upper and lower seams; the reclaimed land surfaces where these mining activities took place now form the corresponding upper and lower "benches" on the site. (Tr. 591-603; DER Ex. 33).

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1. "Tr. denotes "Transcript"; also, for future reference, DER's and Hepburnia's exhibits will be denoted by "DER Ex" and "Hep. Ex" respectively.

12. The lower bench lies on the northern portion of the site; the upper bench is roughly to the south-southeast of the lower bench. (DER Exs. 2,23).

13. Discharge A is located at a point several hundred feet to the north of the site and downhill from it (DER Ex. 2).

14. North of Discharge A is a stream called Laurel Branch Run.

15. Discharge A, after merging with some water running down an erosion gully, flows into Laurel Branch Run. (Tr. 37-38).

16. Discharge A lies very close to the aforementioned erosion gully.

17. The gully runs in a direction about 45° north of west, from the lower bench toward Laurel Branch Run (Tr. 643-5; DER Ex. 2).

18. DER's expert hydrogeologist Joseph J. Lee believes that this erosion gully continues into the subsurface layers beneath the benches on the site, in the form of a subsurface erosional channel.

19. Mining apparently began in the vicinity of the erosional gully (Tr. 591-603; DER Ex. 33).

20. In the immediate vicinity of the gully there was a localized seam of coal about six feet below the "lower" coal seam; this seam also was mined (Tr. 603).

21. Discharge A lies about 30 feet below the lowest elevation of this (mined) localized coal seam (Tr. 603, 720-1).

22. Discharge A is located at a point whose elevation is 1778 feet above sea level (DER Ex. 15).

23. Discharge A flows quite steadily throughout the year, at a rate close to 80 gallons/minute ("gal/min").

24. There are three or four sizeably thick layers of gray shale and

clay in the first 100 feet below the upper bench spoil (Ex. 15).

25. Gray shales are aquitards, i.e., they retard groundwater movement. (Tr. 735-6).

26. Aquitards can be penetrated by joints, i.e., fissures, through which water can flow with little or no impediment (Tr. 202-7, 210-12).

27. Joints can be very numerous about so-called "fracture zones," which often develop along "zones of weakness".

28. Mr. Lee believes the aforementioned erosional channel (Finding of Fact 18) provides a subsurface zone of weakness, along which a fracture zone has developed (Tr. 197-201, 205-7; DER Ex. 2).

29. According to Mr. Lee, this fracture zone runs along the northwest direction followed by the erosional channel, from the upper bench to the site's northern limits.

30. Mr. Lee believes the fracture zone joints are oriented along the direction of the fracture zone (Tr. 205-7, 270, 303-4).

31. The width of the fracture zone, if it exists, should be between 6 and 60 feet (Tr. 277).

32. Fracture zone fissures can extend through a depth of 200 feet and over a length of 3000 feet (Tr. 696).

33. Fracture zones do occur in the broad region wherein the site lies; directions of the associated fissures lie between 20° and 40° west of north (Tr. 198, 270-5).

34. In the absence of fracture zone fissures, groundwater on the upper bench which had percolated down to the bottom of the spoil would not continue to propagate downwards, but instead would migrate along the aquitard boundaries.

35. The direction of this migration (i.e. of the subsurface flow) would be determined by the dips (i.e., slopes) of the aquitards.

36. In the area of the site the regional flow of groundwater (i.e., the typical flow direction in the absence of local anomalies such as fracture zones) is in the largely westerly direction, with a small component toward the north (Tr. 194-6; DER Ex. 2).

37. Mr. Lee estimates that the strata underlying the site have a dip of 2% (Tr. 144-5; DER Ex. 23).

38. Hepburnia's expert Wilson Fisher estimated this dip as 1% (Tr. 840-1).

39. Mr. Lee believes the recharge zone for Discharge A (i.e., the area wherein groundwater reaching Discharge A originates) lies predominantly on a large portion of the upper bench (Tr. 202-4, 281-2; DER Ex. 2).

40. In the absence of local anomalies such as fracture zones (see Finding of Fact 34), only a comparatively small portion of the site to the east of Discharge A could lie in the recharge zone for Discharge A (DER Ex. 2).

41. Whatever may be the direction of regional flow, the groundwater flow direction at any given subsurface point is determined by the conditions in the immediate locality of that point (Tr. 283-5, 307-8).

42. Mr. Lee maintains that the oriented fracture zone fissures, taken together with the dip of the subsurface erosional channel (Finding of Fact 18) cause groundwater reaching the erosional channel to flow in the northwest direction toward Discharge A, instead of continuing to flow along the regional

largely westerly direction (Tr. 203-4, 305-9).

43. Mr. Fisher agrees that fracture zones can exist, but does not believe they exist on this site. (Tr. 695-6).

44. Discharge B is located on the upper bench, in the area Mr. Lee believes is the recharge zone for Discharge A.

45. Discharge B has the characteristics of acid mine drainage ("AMD").

46. The spoils covering the upper and lower benches are more porous than the original overburden on the site.

47. Rainwater percolating through the spoil on the upper bench will form AMD.

48. Water samples have been obtained from five drill holes on the site, numbered 1, 2, 4, 6 and 7 (DER Ex. 35).

49. The drill hole data indicate that the bottom of the spoil on the upper bench lies approximately 140 feet above Discharge A (Tr. 792; DER Exs. 15, 23).

50. Mr. Lee maintains that the fracture zone fissures enable penetration of the upper bench groundwater through the otherwise impedimenting aquitards down to the depth of the subsurface erosion channel and even below. (Tr. 212-13).

51. If the fracture zone fissures do exist, groundwater generated on the upper bench would be able to descend the 140 feet depth difference between Discharge A and the bottom of the upper bench spoil.

52. If the fracture zone does not exist, it is unlikely that groundwater percolating through the upper bench can reach Discharge A.

53. The distance between drill hole 7 and Discharge A is 1700 ft. (Tr.840).

54. The distance to Discharge A from the farthest point of its upper bench recharge area (as estimated by Mr. Lee, see Finding of Fact 39) is no more than 3400 ft. (DER Ex. 2).

55. The drop of the strata between drill hole 7 and Discharge A is 17 ft. (1% dip) to 34 ft. (2% dip) [recall Findings of Fact 37 and 38].

56. Even with a 2% dip, the strata drop only 68 feet in the 3400 ft. between the farthest part of Mr. Lee's upper bench recharge area and Discharge A.

57. No direct observational evidence of the fracture zone and/or associated fracture joints was offered. (Tr. 273-4).

58. Mr. Lee testified that the presence of the fracture zone could be inferred from aerial photographs of the site. (Tr. 208-12).

59. Mr. Fisher testified that the aerial photographs of the site did not reveal fracture zones (Tr. 641-5, 703-4).

60. Dr. Milena Bucek, another Hepburnia expert witness, also testified that the aerial photographs did not show the presence of Mr. Lee's hypothesized fracture zone. (Tr. 866-8).

61. Both Mr. Fisher and Dr. Bucek apparently have had very much more experience than Mr. Lee in analyzing aerial photographs for fracture zone traces. (Tr. 78-9, 641-2, 866).

62. An existing surface erosional gully parallels the subsurface erosional channel Mr. Lee has postulated (Finding of Fact 18).

63. On this particular site, the presence of the fracture zone cannot be inferred from the aerial photographs Mr. Lee studied.

64. Mr. Fisher believes that the large steady flow of Discharge A (recall Finding of Fact 23) implies that Discharge A is fed by a prolific regional aquifer. (Tr. 721-4).

65. Mr. Fisher offered no direct observational evidence for the existence of this hypothesized prolific regional aquifer.

66. Joseph Schueck, a DER hydrogeologist, testified about a "Barnes resistivity" study he had conducted on the site.

67. A Barnes resistivity study involves a sequence of measurements designed to yield the electrical resistivity of the earth in successively deep layers beneath the earth's surface.

68. The measurements are performed by measuring the electrical resistance between electrodes making contact with the earth's surface. (Tr. 350-59).

69. In the Barnes resistivity measurement sequence, the point halfway between the electrodes is moved along a straight line; at each setting of this halfway point, measurements are performed at varying interelectrode distances.

70. From measurements of the sort described (Findings of Fact 67-69), the resistivity of the earth at successively greater depths beneath the surface is inferred from mathematical formulas developed originally in 1952 by a man named Barnes. (Tr. 347, 359-64).

71. The intent of these formulas, and the way they were used by Mr. Schueck is that each increase of, e.g., ten feet between the electrodes (at fixed center point between the electrodes) yields the resistivity at an increased depth of ten feet. (Tr. 360).

72. In essence, the Barnes resistivity formulas Mr. Schueck used presume that the current through the earth when the electrodes are ten feet apart is determined mainly by the resistivity at depths up to ten feet, and similarly for other interelectrode distances.

73. Thus, by appropriately subtracting the previously determined resistivity for depths up to ten feet, the measurement at an electrode spacing of twenty feet yields the resistivity at depths between ten and twenty feet. (Tr. 355-63).

74. Mr. Schueck conducted resistivity studies along two straight lines or traverses (traverse A and traverse S) shown in DER Ex. 2.

75. Mr. Schueck's data, as analyzed by him, indicated a vertical section of comparatively low resistivity at depths between about 50 to 80 feet below the surface point designated as 10+00 on traverse lane A (DER Ex. 30).

76. This section is no more than about 50 feet wide; the resistivities at the aforementioned 50 to 80 ft. depths immediately on either side of this section are about twice as high as in the section.

77. Point 10+00 on traverse lane A lies on the 45^{o} NW line through Discharge A that (according to Mr. Lee) the subterranean erosion channel and fracture zone follow.

78. Mr. Schueck interpreted this low resistivity section as a zone of higher permeability processes, along which water is flowing, indicating the presence of a zone of weakness or fracture trace. (Tr. 391).

79. Mr. Lee regarded Mr. Schueck's interpretation of the low resistivity section as support for the existence of Mr. Lee's hypothesized fracture zone.

80. The use of resistivity studies to gain information about subsurface strata is widely accepted by geophysicists. (Tr. 626).

81. Mr. Fisher testified that Mr. Schueck's application of Barnes resistivity analysis to infer the existence of his narrow fracture zone would not be accepted by the majority of geophysicists. (Tr. 626-9).

82. Mr. Schueck had performed a dozen Barnes resistivity studies before testifying in this matter. (Tr. 334).

83. Mr. Schueck previously has been qualified as an expert on resistivity studies before this Board. (Tr. 335).

84. Mr. Schueck apparently has not had any formal training in the possibly complex mathematical theory involved in deriving the Barnes resistivity analysis formulas. (Tr. 396-400, 626-34).

85. Mr. Fisher has had more formal education in general and more education pertinent to resistivity studies than Mr. Schueck. (Tr. 619).

86. Mr. Fisher has authored a report published by the EPA on the use of geophysical techniques including resistivity analysis. (Tr. 622-4).

87. Mr. Fisher appeared to be familiar with the mathematical complexities of Barnes resistivity analysis. (Tr. 626-34).

88. The Barnes formulas assume the earth is composed of horizontally homogeneous layers. (Tr. 344-50, 626-30).

89. Mr. Schueck's own plot of his results (DER Ex. 30) shows that at depths of 50 to 80 ft. there are gross resistivity inhomogeneities in horizontal distances of 100 ft. either side of the 10+00 traverse lane A surface point beneath which Mr. Schueck locates the fracture zone. (See Findings of Fact 75 and 77).

90. Mr. Schueck's own results are inconsistent with the basic assumptions from which those results are computed.

91. Mr. Schueck's use of the Barnes resistivity formulas to discern a 50 ft. wide zone of reduced resistivity at depths of 50 to 80 ft. is not reliable.

92. Mr. Schueck has not made any attempt to check his predicted resistivities against actual drill hole data. (Tr. 413).

93. The resistivity study data in the immediate area of the traverse point 10+00 were taken on three separate days under differing soil moisture conditions. (DER Ex. 28; Tr. 414-7).

94. The measurements at traverse points 10+00, 10+50 (fifty ft. to the west of 10+00) and 9+50 (fifty ft. to the east of 10+00) were performed on September 23, 1983, December 15, 1983 and October 19, 1983 respectively. (Tr. 344-5; DER Ex. 2).

95. On September 23, 1983 the spoil was moist, following several days of rain; the site was dry on October 19, 1983; the site was extremely wet, with puddles of standing water, on December 15, 1983. (Tr. 393-4).

96. The resistivity of a given subsurface layer can vary widely as the moisture content of the layer varies. (Tr. 340, 371-2, 636-7).

97. Over a period of five years, the iron concentration in Discharge A has been quite constant, between about 20 to 30 parts per million ("ppm") (DER Ex. 35).

98. The iron concentrations in Discharge A, in two filtered samples taken on May 30, 1985 and January 16, 1986, were 19.3 ppm and 30 ppm respectively; on both these dates the pH was 5.5 and the alkalinities were comparable to the acidities.

99. Iron in AMD is expected to remain in solution at low pH's and high acidities, but tends to precipitate out of solution when the pH rises and the solution manifests more alkalinity than acidity. (Tr. 118-20).

100. The iron carried in Discharge A mainly is dissolved iron.

101. Discharge B is located only a few hundred feet from drill hole 7 (DER Ex. 2).

102. Discharge B showed iron concentrations of less than 0.5 ppm, even at pH's as low as 4.5 and acidities much higher than alkalinities (DER Ex. 35).

103. Discharge C shows iron levels between 14 and 83 ppm at pH's less than 4 and zero alkalinities (as against acidities of 1000) (DER Ex. 35).

104. Discharge C is located far from the site (recall Findings of Fact 9 and 10); its recharge area lies in a different portion of the mine than the recharge area for Discharge A. (Tr. 132; DER Ex. 13).

105. Drill holes 1 and 2 are located on the lower bench, close to Mr. Lee's hypothesized fracture zone.

106. Drill holes 1 and 2 almost always show iron levels less than 5 ppm, at pH's of about 5.5 and generally negative acidities.

107. Drill holes 1 and 2 are shallow wells, less than 50 ft. deep. (DER Ex. 15).

108. Drill hole 6 lies on the upper bench, very close to drill hole 7.

109. Drill hole 6 generally showed iron levels less than 5 ppm at pH's about 5.5 and alkalinities comparable to acidities.

110. Some drill hole 6 samples taken by DER did show iron concentrations as high as 40 ppm.

111. Drill hole 6 is drilled to a depth just below the upper bench coal seam mined by Hepburnia. (Tr. 156; DER Ex. 32).

112. Drill hole 6 is recharged mainly by water which has percolated through the upper bench spoil. (Tr. 157).

113. DER has offered no objective evidence in support of its thesis that the water samples taken at Discharge B were low in iron because iron previously had been precipitated out of solution.

114. DER did not filter the discharge samples DER took.

115. The manganese concentrations in Discharge A are not larger than the manganese concentrations in Discharge B or in several of the drill holes, e.g., drill hole 4 (DER Ex. 35).

DISCUSSION

A. Introduction

Much of the history of this dispute has been given in our Opinion and Order of September 6, 1985, at Docket Nos. 85-309-G and 85-343-G (the appeals were consolidated by this September 6, 1985 Order). Our September 6, 1985 Opinion and Order was issued after a hearing on petitions for supersedeas filed by Hepburnia in each of the two appeals; the petitions were denied. Simultaneously, however, we ruled on a number of motions filed by the parties. In particular we ruled that — even though Hepburnia had not complied with DER's July 16, 1985 Order — DER must continue processing Hepburnia's presently pending permit applications up to but not including issuance (assuming those permit applications would be approved for issuance if DER had not set up a permit block based on the appealed-from July 16, 1985 compliance order), as long as the lawfulness of the July 16, 1985 order remained unadjudicated. On the other hand, we refused to order DER to issue an allegedly already fully processed permit for Hepburnia's so-called Snyder site. Our September 6, 1985 Opinion also indicated our willingness to seriously examine allegations by Hepburnia that DER's actions in this matter had violated Hepburnia's due process rights.

Largely in deference to Hepburnia's due process allegations, during October 8-11, 1985 this consolidated appeal received an expedited full hearing on the merits, almost a year ahead of its original schedule. The hearing was devoted solely to the propriety of DER's ordering Hepburnia to treat Discharge A (Finding of Fact 8); at the hearing Hepburnia did not challenge DER's order that Hepburnia treat discharges B and C. Nor, at the hearing, did Hepburnia renew its claims that the permit for the Snyder site should have been issued, or that its due process rights had been violated. Hepburnia's post-hearing brief also fails to renew these

Snyder and due process claims; Hepburnia's post-hearing brief (at page 15) explicitly affirms its acceptance of responsibility for Discharges B and C.

The Board's scope of review is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel, Inc. v DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Issuance of the July 16, 1985 order obviously was a discretionary action by DER. Therefore, in view of the preceding paragraph, this Adjudication is confined to the sole question: Was DER's order requiring Hepburnia to treat Discharge A an abuse of DER's discretion? Insofar as the July 16, 1985 Order pertains to Discharges B and C, it perforce must be sustained; Hepburnia's aforesaid Snyder and due process claims are deemed waived.

B. Burden of Proof

We now turn to the issue of who has the burden of proof in this matter. This issue was debated by the parties at the hearing on the merits, and has been the subject of much discussion in the parties' post-hearing briefs. The burden of proceeding and the burden of proof (i.e., the burden of persuasion) in appeals before this Board are governed by the Board's rules and regulations, notably 25 Pa. Code §21.101. The relevant portions of §21.101 read as follows:

> §21.101. Burden of proceeding and burden of proof.
>
> (a) In proceedings before the Board the burden of proceeding and the burden of proof shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of any issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish his case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or

should have knowledge of facts relevant to the issue.

(b) The Department shall have the burden of proof in the following cases:

. . .

(3) where it orders a party to take affirmative action to abate air or water pollution; or any other condition or nuisance, except as otherwise provided in this rule:

. . .

(d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:

(1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a law or regulation is being violated; and

(2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

(e) Where the criteria set forth by subsection (d) of this section are shown, the party causing, or who will probably cause, the environmental damage will be presumed to have possession, or the duty to have possession, of facts relating to the quantum and nature of such damage.

DER argues that under the facts of this appeal, the criteria of §21.101(d)(1) and (d)(2) are satisfied, so that Hepburnia must bear the burden of proof. Hepburnia objects strongly to this argument of DER's, and maintains that DER must be assigned the burden of proof, under the general principles enunciated in §21.101(a) and the explicit instruction of §21.101(b)(3). Our review of the evidence indicates that the burden of proof assignment is crucial to the adjudication of this appeal. Therefore this issue of who has the burden of proof in this appeal requires a careful thorough discussion, especially since our decision in this question undoubtedly will serve as precedent for future appeals;

DER orders to mine operators requiring the treatment of discharges at surface points which were not obviously affected by the mining operation are far from uncommon.

DER's case for shifting the burden of proof to Hepburnia under §21.101(d) is as follows. The criterion (d)(1) assuredly is satisfied, because Hepburnia admits that "Discharge A is characterized by extremely high iron concentrations" (Hepburnia's proposed Finding of Fact 2), i.e., Hepburnia admits that some degree of pollution or environmental damage is taking place. More specifically, 25 Pa. Code §87.102(a)(2) forbids the discharge of water (from areas disturbed by mining activities) containing a concentration of iron exceeding 7.0 milligrams per liter ("mg/l"); Hepburnia admits that the water sampling data put into evidence showed "the iron concentration of Discharge A consistently fell into a relatively narrow range of between 19.2 and 32.6 mg/l". (Hepburnia's proposed Finding of Fact 24). In fact, violation of the effluent limits in §87.102 was the reason given by DER for issuing the appealed-from compliance order (DER Ex. 8). As for criterion (d)(2) of §21.101(d), DER maintains that this criterion should apply when the recipient of DER's order (here Hepburnia) has "both qualitatively and quantitatively greater access to the key facts" (DER post-hearing brief, p. 26). DER then argues that Hepburnia necessarily has or had both qualitatively and quantitatively greater access to the key facts of this appeal because the discharge was not discovered — and therefore not investigated — by DER until after the mine had been closed; thus, according to DER, only Hepburnia -- not DER — ever was in a position to observe key facts such as "the lay of the strata, the nature and characteristics of the overburden encountered, visible evidence of structural features, the behavior and quantity of groundwater encountered during operations, which direction surface water flowed,

where pit water accumulated, whether there were other mines encountered, how much the machinery or blasting affected the underclays, how much coal was left behind ... the list goes on indefinitely" (quoting from DER post-hearing brief, p. 27). On grounds such as these, DER maintains §21.101(d)(2) also is satisfied.

Hepburnia counters that DER, through discovery, has received access to all relevant facts available to Hepburnia. Hepburnia further argues that -- because DER did not claim Hepburnia was responsible for Discharge A until after the mine had been closed -- Hepburnia had no more opportunity and no more reason than DER to ascertain the above-listed "key facts" relating to Discharge A. Hepburnia therefore contends that [in the language of §21.101(d)(2)] it is not "in possession of the facts relating to" Discharge A any more than DER is, and that there is no reason to think Hepburnia rather than DER "should be" or ever was in possession of those facts. Hepburnia, therefore maintains that the criterion (d)(2) is not satisfied under the facts of this appeal, so that the burden of proof should fall on DER under the usual burden of proof assignment of §21.101(b)(3).

The burden-shifting §21.101(d) has not been construed often. In Hawk Contracting and Adam Eidemiller v. DER, Docket No. 80-072-H (Adjudication, December 2, 1981), 1981 EHB 150, the Board applied §21.101(d) to shift the burden of proof to surface mining operators ordered to abate acid mine discharges observed after mining had ceased. In W. P. Stahlman Co., Inc. v. DER, Docket No. 83-301-G (Adjudication, April 29, 1985), the Board refused to apply §21.101(d) to shift the burden of proof to a surface mining operator who had been ordered to replace the water supply of a resident in the area. 25 Pa. Code §21.101(d) is cited in A. H. Grove & Sons, Inc. v. DER, 452 A.2d 586 (Pa. Cmwlth. 1982), but is not

construed therein, nor does the Grove holding appear to depend in any way on inferences from §21.101(d). We must attempt to apply §21.101(d) under the facts of the instant appeal in the light of the aforesaid slender line of precedent. Since (as has been explained supra) Hepburnia does not dispute that the criterion (d)(1) is satisfied, we can and do confine our attention to the criterion (d)(2).

To begin, we do not think Hepburnia's argument--that the burden of proof should not be shifted because DER, through discovery, has access to all relevant facts available to Hepburnia -- is sound. The Environmental Quality Board ("EQB") undoubtedly promulgated §21.101(d) in full awareness of the fact that §21.111 of the Board's rules and regulations allows parties in appeals before this Board to engage in any discovery permitted under the liberal discovery rules of the Pennsylvania Rules of Civil Procedure. Consequently the fact that DER ultimately can discover any relevant facts known to Hepburnia cannot be germane to the construction of §21.101(d)(2). Even though DER may have discovered all relevant facts known to Hepburnia, those facts -- whether favorable to DER or not -- do not become of record in this appeal until entered into evidence. It is more practical and more logical to require that such evidence be presented by the party who initially obtained the facts, and who therefore can speak most directly about the circumstances under which those facts came to light. We surmise that this reasoning underlies the EQB's inclusion in the Board's rules of the last sentence in §21.101(a), wherein the burden of going forward (but not the burden of persuasion) is shifted from the usual common law rule expressed in the first sentence of §21.101(a). Moreover, for reasons just explained, we believe the EQB must have intended that §21.101(a) be applied to shift the burden of going forward to the side which initially came into possession of facts "relevant to the issue", irrespective of how much knowledge of those facts the other side manages to gain pre-trial via discovery.

The language of §21.101(d)(2) obviously tracks the language in the last sentence of §21.101(a). Hence we conclude that -- when but only when the environmental damage special criterion of §(d)(1) is satisfied -- the EQB intended that the burden of going forward and the burden of persuasion be shifted to the party (here Hepburnia) alleged to be responsible for the environmental damage provided such party is the party who initially (not, e.g., through discovery) came into possession of the facts relating to such environmental damage."

It follows that if Hepburnia initially had come into possession of the "key facts" (DER's own language) relating to Discharge A, then under §21.101(d) the burden of persuasion in this appeal should shift to Hepburnia. Some of these key facts — especially the hotly disputed factual issue whether there is a fracture zone permitting ground water to percolate vertically through the clay at the pit floor — certainly more likely would have come into Hepburnia's initial possession, not DER's; after all, it was Hepburnia, not DER, which did the mining and had the predominant opportunity to determine, e.g., whether fracture zones were present. The evidence showed, however, that Hepburnia's employees, though they may have had the predominant opportunity to do so, actually did not make the observations during mining which could have ascertained directly the disputed key facts. Thus, as DER concedes (DER post-hearing brief pp. 27-28) in the instant appeal those key facts, especially the disputed fact of the existence of the fracture zone on which DER's theory of the hydrologic connection between the Hepburnia site and Discharge A largely relies, had to be inferred -- by DER, Hepburnia and the Board -- from indirect circumstantial evidence, instead of being directly ascertainable from first-hand observations.

In other words, under the facts of this appeal the criterion (d)(2)

of §21.101 for shifting the burden to Hepburnia will not be satisfied unless it legitimately can be concluded that Hepburnia "should be" in possession of the key facts relating to Discharge A, i.e., should have ascertained those facts (especially the facts concerning the DER postulated fracture zone) during the mining when such facts were directly ascertainable. Unfortunately (for the Board's adjudicative function), the standard for deciding whether Hepburnia "should have" ascertained the required key facts during its mining activities is far from clear. DER apparently is arguing that Hepburnia's obvious opportunity to ascertain the key facts during its mining activities necessarily implies that Hepburnia should have ascertained those facts. We are not willing to go that far, however. We do agree that there are some observations which any reasonably competent mining operator should make in the course of mining. Such observations include those the Board declared the mine operator should have made in Hawk Contracting, supra, namely:

> evidence concerning such matters [as] the numbers of seams of coal mined, old deep mine workings encountered, the condition of the barrier between the properties, and groundwater encountered during mining.

But except possibly for "groundwater encountered during mining", the just-quoted key matters which the Hawk Contracting mine operator should have ascertained have little import for the key facts at issue in the instant appeal.

In so writing, we do not imply that the quote supra from Hawk Contracting lists all the types of observations a mine operator reasonably should be expected to make. On the other hand, DER has given us little reason to conclude that, at the time of mining, Hepburnia should have made whatever observations were needed to decide the key factual issues of this appeal, especially the key disputed fact of the existence of a fracture zone at the floor of the pit. There was no evidence

that such observations normally are made by a mine operator in the course of responsible environmentally sound mining practice; indeed, William Thorp, Hepburnia's production superintendent at the mine (whose conduct of Hepburnia's mining was not criticized by DER), testified that he didn't know what a fracture was supposed to look like (Tr. 595). There is no regulation requiring a mine operator to look for fracture zones, nor did the permit contain any such special condition. We see nothing in the regulations to suggest that a responsible mine operator, seriously seeking to operate its mine in a fashion which will avoid environmental pollution, should realize that fracture zone observations are part of the operator's responsibility. In sum, short of accepting DER's apparent thesis that opportunity to make an observation implies the observation should have been made, under the circumstances of this appeal we see no basis for concluding that Hepburnia should have been in possession of the key facts concerning Discharge A.

Therefore we hold that the burden-shifting criterion §21.101(d)(2) is not satisfied in the instant appeal, so that the burden of proof remains DER's under the usual assignment of §21.101(b)(3). Our analysis of the evidence has been performed with this holding in mind. We stress that the holding obviously is controlled by the specific circumstances of this appeal; we see no contradiction between our present holding and our holding in Hawk Contracting, supra. We further stress that in different circumstances, wherein it may have been shown that via regulation or special permit condition the mine operator has been required to observe fracture zones or the like, we might agree the "should be in possession" criterion of §21.101(d)(2) has been satisfied. We cannot agree, however, that in promulgating §21.101(d)(2) the EQB intended that any reasonably responsible coal operator must

be imputed to have the foresight to have made all observations — including observations not required by regulations, special permit conditions or merely customary environmentally sound mining practices -- needed to ascertain the key facts related to any environmental damage which the operator at a later time (after having closed the site) may be charged with having caused.

C. Hypothesized Fracture Zone

Hepburnia's mining activities in the vicinity of the mine have been extensive; in fact, four distinct areas were mined. For the purposes of this appeal, however, we can concentrate on the north-northeastern portion of the areas mined, in which portion about 120 acres were affected. Two major coal seams were mined on the site, which have been termed the upper and lower seams; the associated spoils and reclaimed land surfaces where these seams were mined now form upper and lower "benches". The lower bench lies on the northern portion of the site; the upper bench is roughly to the south-southeast of the lower bench. Discharge A is located at a point several hundred feet to the north of the site and downhill from it, i.e., downhill from the lower bench. In fact, Discharge A lies very close to an erosional gully which runs in a northwest direction (about 45° north of west) from the lower bench toward Laurel Branch Run. Mining apparently began in the vicinity of this erosional gully. In the immediate vicinity of the gully, moreover, there was a localized seam of coal about six feet below the lower seam; this localized seam also was mined. Discharge A, whose elevation is 1778 feet above sea level, lies about 30 feet below the lowest elevation of this mined localized coal seam.

As we have allocated the burden of proof, DER must convince us by the

preponderance of the evidence that those features of Discharge A which require treatment (e.g., the high iron concentrations) are ascribable — in whole or in significant part — to groundwater reaching Discharge A after percolating through (and thus becoming polluted by) the site. Unless we are so convinced, DER's order requiring Hepburnia to treat Discharge A must be adjudged an abuse of DER's discretion. DER's case for the existence of a hydrologic connection between the site and Discharge A was developed primarily through the testimony of its expert hydrogeologist Joseph J. Lee, Jr. His theory of this hydrologic connection is as follows.

Running through the site according to Mr. Lee, from the upper bench to the site's northern limits, is a surface "fracture zone" containing "joints" (i.e., fissures) through which water can flow with little or no impediment. Mr. Lee believes that this fracture zone coincides with (and in some respects is caused by) a subsurface erosional channel which is the extension of the aforesaid erosional gulley into the benches on the site; according to Mr. Lee the erosional channel provides a subsurface zone of weakness wherein joints can develop. Mr. Lee also believes the fracture zone fissures are oriented along the northwest direction followed by the erosional channel; the fracture zone width should be between 6 and 60 feet. Fracture zone fissures can extend through a depth of 200 feet and over a length of 3000 feet.

As Mr. Lee sees it, the fracture zone enables much of the site to the southeast of Discharge A, including a large portion of the upper bench, to be a recharge zone for Discharge A (i.e., an area wherein groundwater reaching Discharge A originates). In the area of the site the regional flow of groundwater is in a largely westerly direction, though there is a component of the flow toward the north; on this basis it is evident from DER Ex. 2 that only a comparatively small portion of the site to the east of Discharge A could furnish groundwater to Discharge A. However, the direction of regional flow need not be the

flow direction at any given subsurface point; the local flow direction is determined by local conditions. In particular, Mr. Lee maintains that the oriented fracture zone fissures, taken together with the "dip" (i.e., slope) of the erosional channel, cause groundwater reaching the erosional channel to flow in the northwest direction toward Discharge A, instead of continuing to flow along the regional largely westerly direction. In other words, along the entire subsurface length of the erosional channel the fracture zone intercepts the regional westerly groundwater flow and deflects this flow into a flow along the erosional channel towards Discharge A; in this fashion Discharge A can receive groundwater from a very substantial portion of the site, contained in an extended range of directions broadly southeast of Discharge A, instead of having to receive groundwater directly (without the aforementioned deflection) from the regional westerly flow originating in the comparatively small portion of the site almost due east of Discharge A. Mr. Lee's estimate of the recharge area for Discharge A, arrived at via the line of reasoning just described, includes a large portion of the upper bench.

Discharge B is located on the portion of the upper bench that Mr. Lee believes is the recharge area for Discharge A. Hepburnia has conceded that Discharge B requires treatment, and that Hepburnia's mining activities have caused the acid mine drainage ("AMD") manifested in Discharge B. It is conceded, therefore, that rain water falling on the upper bench will be AMD after percolating through the comparatively porous (i.e., not packed as tightly as the original overburden strata) spoil covering the upper bench. However, the data from drill holes 6 and 7 -- located on the upper bench along the postulated subsurface erosion channel (DER Ex. 2) -- indicate that the bottom of the

spoil on the upper bench lies approximately 140 feet above Discharge A at 1778 ft. Thus DER, as part of its burden of establishing a hydrologic connection between the site and Discharge A, must make it plausible that the groundwater can descend the 140 ft. vertical depth between the upper bench spoil bottom and Discharge A.

Mr. Lee contends that this 140 ft. descent of the groundwater occurs via the aforementioned fracture zone fissures. Specifically, he contends that once the groundwater has been deflected along the erosional channel towards Discharge A, the groundwater flows not only to the northwest along the fissures but also downward through the fissures to the depth of the subsurface erosion channel and even below. DER's own summary of Mr. Lee's testimony in this regard is: "Fracture zones have relatively high permeability. As a result, they serve as a conduit for groundwater flow. . .They also allow for its downward migration through what otherwise would be inhibiting strata. In other words, they act as a groundwater sink." (DER post-hearing brief, p. 18).

Hepburnia's expert Wilson Fisher agrees that fracture zones can exist, although he does not agree that they exist on this site. Mr. Fisher's testimony was consistent with the thesis that the fracture zone fissures, if they did exist, could enable the groundwater generated on the upper bench to descend the 140 ft. depth difference between Discharge A and the bottom of the upper bench spoil. Reviewing all the evidence we conclude that if the fracture zone exists, then DER has met its burden of establishing a hydrologic connection between Discharge A and the AMD generated in the upper bench. On the other hand, we also conclude that if the fracture zone does not exist, then it is unlikely that groundwater

percolating through the upper bench can reach Discharge A. Exhibit 15 shows that there are several (three or four) sizeably thick layers of gray shale and clay in the first 100 feet below the upper bench spoil. Mr. Fisher testified that gray shales "are clay rich, compact dense rock that retard groundwater movement," i.e., are aquitards; this testimony by Mr. Fisher was not rebutted. Thus, in the absence of fracture zone fissures the rain water falling on the upper bench, once it had percolated downwards through the loose upper bench spoil, would not continue to percolate downwards but instead would migrate along aquitard boundaries, in directions determined by the dips of the aquitards.

Furthermore, the dip of the underlying strata in the site is far too gentle to account for the necessary 140 ft. of groundwater descent during groundwater flow from the upper bench to Discharge A along aquitard boundaries. DER's Ex. 23, prepared by Mr. Lee, shows a drop of about 20 ft. in 1000 ft., i.e., a dip of 2%. Mr. Fisher estimated that the dip of the underlying strata between drill hole 7 and Discharge A was one percent. The distance between drill hole 7 and Discharge A is 1700 ft.; the corresponding drop of the strata between drill hole 7 and Discharge A would be 17 ft. (1% dip) to 34 ft. (2% dip). The distance to Discharge A from the farthest portion of its upper bench recharge area (as estimated by Mr. Lee on DER Ex. 2) is no more than twice the distance between drill hole 7 and Discharge A, i.e., is no more than 3400 ft. Even with a 2% dip, the strata drop only 68 feet in a horizontal distance of 3400 ft. Even if the dip is as great as 2%, therefore, the AMD generated in the upper bench cannot reach Discharge A without percolating downwards at least 72 ft. (140-68) through a number of sizably thick aquitards (at least two, judging by the drill hole 7 data). It is our view that in the absence of fracture joints such downward percolation is implausible.

No direct observational evidence of the fracture zone and/or associated fracture joints was offered; consequently the existence of the fracture joints must be termed a hypothesis, whose validity it is DER's burden to demonstrate. The arguments in support of this hypothesis by DER, mainly through Mr. Lee's testimony, are as follows:

> 1. The presence of the fracture zone can be inferred from aerial photographs of the site.
>
> 2. Studies have shown that fracture zones occur in the broad region wherein the site lies. The directions of the associated fissures lie between 20^{o} and 40^{o} west of north.
>
> 3. The relatively high flow of Discharge A (80 gal./min.) could not be sustained in the absence of fracture joints (Tr. 213).
>
> 4. A DER resistivity study along an east-west traverse on the site showed there was a vertical zone of low resistivity precisely where the traverse intersected Mr. Lee's 45^{o} north of west line locating the subsurface erosional channel.

Hepburnia countered these arguments primarily through Mr. Fisher's testimony. In particular, Mr. Fisher testified that in his opinion the aerial photographs of the site did not reveal fracture zones; this testimony was corroborated by Dr. Milena Bucek, another Hepburnia expert witness. Both Mr. Fisher and Dr. Bucek appear to have had very much more experience than Mr. Lee in analysing aerial photographs for fracture zone traces. We find quite believable Mr. Fisher's suggestion that on the aerial photographs an existing surface erosional gully (which apparently parallels the subsurface erosional channel Mr. Lee envisages) easily can be mistaken for evidence of a subsurface fracture zone. In sum, on balance we are not convinced that (on this particular site, at any rate) the presence of the fracture zone can be inferred from aerial

photographs of the site.

We find equally unconvincing DER's arguments 2-4 supra, in support of the fracture zone hypothesis. For reasons we have explained, postulating a fracture zone seems to be necessary to understand how groundwater from Mr. Lee's estimated upper bench recharge zone can reach Discharge A without great diminution by intervening aquitards; therefore, to adduce the large flow of Discharge A as evidence for the presence of a fracture zone merely begs the question. For reasons detailed infra we thoroughly reject DER's conclusions from its resistivity study, i.e., we reject DER's argument 4 supra. This leaves us with the statistically based argument 2 supra, as the sole possibly convincing argument in favor of the fracture zone hypothesis. If there were other good arguments for the presence of the fracture zone on the site, those arguments would be reinforced by the knowledge that fracture zones are not uncommon in a broad region encompassing the site. In the absence of other supporting arguments or data, however, the broad region statistical studies cited in argument 2 cannot imply that on this particular site there is a fracture zone with fissures oriented 45^{o} west of north.

D. The Resistivity Study

We feel obliged to detail our reasons for rejecting -- as evidence for the existence of a fracture zone -- DER's resistivity study, on which DER expended very considerable effect. The study was conducted by Joseph Schueck, a DER hydrogeologist, who testified at the hearing. A resistivity study consists of an appropriate sequence of measurements of the electrical resistance between electrodes making contact with the earth's surface. In the sequence the point halfway between the electrodes is moved along a predetermined straight line on which the electrodes also lie; the distance between the electrodes is varied

as well. From these resistivity measurements, the resistivity of the earth at successively greater depths beneath the surface (for points along the aforementioned straight line, of course), is inferred from mathematical formulas developed originally by one Barnes in 1952. The intent of these formulas, and the way they were used by Mr. Schueck, is that each increase of, e.g., ten feet in the distance between the electrodes (keeping fixed the center point between the electrodes) yields, via the formulas, the resistivity at an increased depth of ten feet. In essence, the current through the earth when the electrodes are ten feet apart is regarded as determined mainly by the resistivity at depths up to ten feet; the current through the earth when the electrodes are twenty feet apart is thought to be determined by the earth's resistivity at depths up to twenty feet. Thus, by appropriately subtracting the previously determined resistivity for depths up to ten feet, the measurement at an electrode separation of twenty feet yields the resistivity at depths between ten and twenty feet. The data obtained by Mr. Schueck via the above-described procedure are given in DER Exs. 28 and 29. Mr. Schueck actually conducted measurements along two straight lines, labeled as traverse lane A and traverse lane S in DER Ex. 2. The resistivity values inferred by Mr. Schueck, as a function of depth along the lines, are plotted in DER Exs. 30 and 31 respectively. The key result of the resistivity study, on which Mr. Schueck primarily based his conclusion that a fracture zone exists, is the manifestation on Ex. 30 of a vertical section of comparatively low resistivity at depths between about 50 to 80 feet below the surface point designated as 10+00 on traverse lane A. This section is no more than about 50 feet wide; immediately on either side of this section, at the aforementioned 50 to 80 feet depths, the resistivity is significantly higher, indeed, almost twice as high. From DER Exs. 2 and 32 it can be seen that point 10+00 on traverse

lane A lies at the intersection of traverse lane A with the 45° NW line through Discharge A that (according to Mr. Lee) the subterranean erosion channel and associated fracture zone follow. According to Mr. Schueck this low resistivity section is "a zone of higher permeability processes, than adjacent rock, along which water is flowing", which thereby indicates a "zone of weakness, . . . probably a fracture trace or a fault."

Before evaluating Mr. Schueck's testimony, we first must deal with a threshold issue raised by Hepburnia, namely is Mr. Schueck's conclusion that a fracture zone exists an admissible inference from his resistivity study. Hepburnia contends that Mr. Schueck's particular application of the Barnes resistivity analysis technique does not satisfy the so-called Frye test, which — Hepburnia further contends — is the relevant Pennsylvania test for the admissibility of scientific evidence. DER apparently concedes that the Frye test governs (Tr. 459), but argues that Mr. Schueck's application of resistivity analysis satisfies the test.

The Frye test was enunciated in Frye v. United States, 293 F.1013 (D.C. Cir. 1923). Since then, the test has been the subject of numerous law review articles[2] and legal conferences[3]. The defendant in Frye had appealed the trial court's exclusion of expert testimony based on a "systolic blood pressure deception test", a forerunner of the modern polygraph. In upholding the trial court's exclusion of this testimony, the D.C. Court of Appeals wrote:

2. See, e.g., Frederick B. Lacey "Scientific Evidence", 24 JURIMETRICS 254 (1984).
3. See, e.g., "Symposium on Science and the Rules of Evidence," sponsored by the American Bar Association and the American Association for the Advancement of Science, 99 F.R.D. 188(1983).

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Thus, quoting Professor Paul Giannelli in the 1983 Symposium[3] at 189,

> [U]nder the Frye standard, it is not enough that a qualified expert, or even several experts, testify that a particular scientific technique is valid; Frye imposes a special burden—the technique must be generally accepted by the relevant scientific community.

Evidently it is very difficult for a novel but nevertheless well-founded scientific technique to meet the Frye test (Lacey[2] calls it "the dead hand of Frye"). The issue of the admissibility of Mr. Schueck's testimony is especially cloudy under the Frye test because even Hepburnia's Wilson Fisher agrees that the use of resistivity studies to gain information about subsurface strata is widely accepted by geophysicists. Therefore Hepburnia is objecting merely to Mr. Schueck's use of the Barnes analysis to infer the existence of a narrow (50 foot wide) fracture zone at 50 to 80 foot depths, not Barnes resistivity studies per se; according to Mr. Fisher, Mr. Schueck's particular application of resistivity analysis would not be accepted by the majority of geophysicists.

We feel that Mr. Fisher's objections are directed more to the weight of Mr. Schueck's testimony than to the general principle that resistivity studies can garner reliable information about subsurface layers. Therefore, although the issue is not free from doubt, we rule that Mr. Schueck's testimony is admissible under the Frye test, though we will have to decide whether that testimony

should be given much if any weight in the face of Mr. Fisher's objections, which we have yet to describe. We remark that, as detailed infra and already foreshadowed, this decision to admit Mr. Schueck's testimony is essentially inconsequential, since in fact we do give that testimony very little weight.

Although Mr. Schueck has performed a dozen Barnes resistivity studies, and although he has been qualified previously as an expert on resistivity studies before this Board, he apparently has not had any formal training in the possibly complex mathematical theory involved in deriving the Barnes resistivity analysis formulas. Mr. Fisher has had more (and more pertinent) formal education than Mr. Schueck, has been the author of a report published by the EPA on the use of geophysical techniques including resistivity analysis, and appeared to be familiar with the mathematical complexities of Barnes resistivity analysis. Moreover, we feel that Mr. Fisher's criticisms of Mr. Schueck's analysis make good sense.

In particular, we agree that Mr. Schueck's use of the Barnes resistivity analysis formulas to discern a fifty foot wide zone of reduced resistivity at depths of 50 to 80 feet cannot be considered reliable. Mr. Schueck's explanation of the Barnes analysis was consistent with Mr. Fisher's assertion that the Barnes formulas assume the earth is composed of horizontally homogeneous layers, i.e., of layers whose resistivities vary at most very slowly with horizontal displacement (of the center point between the current carrying electrodes). Without this assumption, Mr. Schueck's previously described subtraction technique obviously is incorrect, since the technique clearly presumes that the resistivity of the earth in the up to ten foot deep layer between the electrodes at ten foot

separation is the same as the resistivity in the entire twenty foot long up to ten foot deep layer between the electrodes at twenty feet separation. But Mr. Schueck's own plot of his results (DER Ex. 30) shows that at depths of from 50 to 80 feet there are gross resistivity inhomogenities in horizontal distances of 100 feet either side of the 10+00 traverse lane A surface point beneath which Mr. Schueck locates the fracture zone. In other words, Mr. Schueck's own results plotted in DER Ex. 30 are inconsistent with the basic assumptions from which those results are computed. It is conceivable that the errors in Mr. Schueck's computed results are not as great as the immediately preceding discussion suggests and Mr. Fisher believes (Tr. 633). However, as Mr. Fisher rightly points out, Mr. Schueck -- despite the aforesaid inconsistency between Mr. Schueck's results and the Barnes analysis assumptions -- has not made any attempt to check,against actual drill hole data, his predicted low resistivities at 50-80 feet below surface point 10+00. The above-discussed difficulties with Mr. Schueck's analysis are compounded by the fact that data in the immediate area of the critical traverse point 10+00 were taken on three separate days in three different months under differing soil moisture conditions. Specifically, the measurements at traverse point 10+00 were performed on Sept. 23, 1983; the measurements at 10+50 (fifty feet to the west of 10+00) were performed on December 15, 1983; the measurements at 9+50 were performed on October 19, 1983. The spoil was moist, following several days of rain, on September 23, 1983; the surface of the site was dry on October 19, 1983; the site was extremely wet, with puddles of standing water, on December 15, 1983. Correspondingly, the amount of water contained in subsurface layers, even layers as deep as 50 feet below the

surface in the vicinity of 10+00 (which is only about 20 feet below the spoil and wash material in that area, DER Exs. 15 and 32), may have differed considerably on the three days Mr. Schueck performed his measurements. The resistivity of a given subsurface layer can vary widely as the moisture content of the layer varies. On these facts, even if (purely arguendo) applicability of the Barnes formulas were conceded, Mr. Schueck's attempt to read significance into a 50 foot wide 50-80 foot deep low resistivity section at 10+00, sandwiched between higher resistivities at 9+50 and 10+50, seems highly dubious.

To sum up this discussion of Mr. Schueck's resistivity study, for reasons explained supra we must reject DER's contention that the results of that study provide support for Mr. Lee's hypothesized fracture zone.

E. Can A Hydrologic Connection Be Inferred?

The gist of our discussion to this point is that DER has not met its burden of showing that the existence of Mr. Lee's hypothesized fracture zone is more likely than not. Therefore, as stated earlier, we must conclude that DER has not met its burden of establishing a hydrologic connection between Discharge A and groundwater arising in the upper bench. Mr. Lee has testified that the recharge area for Discharge A lies predominantly on the upper bench. Mr. Lee apparently also admits that in the absence of the hypothesized fracture zone providing a hydrologic connection between Discharge A and the large upper bench recharge area, the 80 gal./min. magnitude of Discharge A's flow cannot be ascribed to upper bench recharge (Tr. 213). DER's post-hearing brief concedes (at 54): "The Commonwealth's case, however, is based primarily on the acid mine drainage being produced on the upper bench."

Taken together, the assertions in the preceding paragraph seem to

imply that DER has not met its burden of showing that the pollutional features of Discharge A are ascribable to Hepburnia's mining activities. In other words, the preceding paragraph seems to imply that DER's order requiring Hepburnia to treat Discharge A was an abuse of DER's discretion. Nevertheless, DER — perhaps anticipating the above implication — argues in its post-hearing reply brief that its order was justified "even if the Board ignores the fracture zone theory." As we understand this argument of DER's, DER is not denying the need for a hydrologic connection between the site and Discharge A. Rather, DER now is contending that the existence of some hydrologic connection can be and should be inferred by the Board even if DER has been unable to show by direct hydrogeologic evidence that the hypothesized fracture zone is the mechanism for the hydrologic connection. We proceed to examine this belated DER contention.

In essence DER is arguing that there must be a hydrologic connection because the only reasonable explanation for the pollution in Discharge A is the AMD which Hepburnia concedes the site is producing. There is some force to this argument. After all, Discharge A is immediately downhill from the site so that the site is the most immediately obvious possible source for the pollution in Discharge A. But the detailed chemical properties of Discharge A cast considerable doubt on the thesis that Discharge A must be fed by AMD originating in the site. Over a period of five years, the iron concentration in Discharge A has remained quite constant, between about 20 to 30 ppm. The iron concentrations in two filtered samples, taken on May 30, 1985 and January 16, 1986, were 19.3 ppm and 30 ppm respectively. On both these dates, the pH of Discharge A was 5.5, and the alkalinities were comparable to the acidities. AMD iron is expected to remain in solution at low pH's and high acidities, but tends to precipitate out of solution when the pH rises and the solvent water has positive alkalinity rather than acidity.

The foregoing facts mean that Discharge A is carrying mainly dissolved (since not removed by filtering) iron at concentrations between 20 to 30 parts per million, even at pH's as high as 5.5 and alkalinities no greater than acidities. On the other hand, Discharge B -- located only a few hundred feet from drill hole 7 and in Mr. Lee's envisaged recharge area for Discharge A -- showed iron concentrations of less than 0.5 ppm, even at pH's as low as 4.5 and acidities much higher than alkalinities. Discharge C, for which Hepburnia also has admitted responsibility, does show iron levels between 14 and 83 ppm at pH's less than 4 and zero alkalinities as against acidities of 1000, but Discharge C is located far from the portion of the mine we have termed the site, and its recharge area lies in a correspondingly different portion of Hepburnia's mine drainage permit than the recharge area for Discharge B or Mr. Lee's recharge area for Discharge A. Drill holes 1 and 2 on the lower bench, close to Mr. Lee's hypothesized fracture zone, almost always show iron levels less than 5 ppm, at pH's of about 5.5 and generally negative acidities. Drill hole 6, on the upper bench very close to drill hole 7, also generally showed iron levels less than 5 ppm at pH's about 5.5 and alkalinities comparable to acidities, although some drill hole 6 water samples taken by DER did show iron concentrations as high as 40 ppm. Drill holes 1 and 2 are shallow wells, less than 50 feet deep. Drill hole 6, which ends just below the upper bench coal seam mined by Hepburnia, must be recharged mainly by water which has percolated through the upper bench spoil.

On the facts recounted in the preceding paragraph, it seems implausible that the iron concentration in water actually filtering through the spoil on either the upper or lower bench ever becomes as high as is regularly observed in Discharge A. Moreover, because Discharge A's flow is so large and so steady over time, and because we have concluded Mr. Lee's fracture zone hypothesis is unlikely,

we must conclude further that (if anything) the groundwater which somehow reaches Discharge A after percolating through spoil on the site will be diluted by other sources of groundwater (as DER recognizes, post-hearing brief at 35-36). Assuming these other non-Hepburnia sources of groundwater are iron free as DER maintains (post-hearing brief at 35), this likely dilution makes it even less plausible that the iron concentrations in Discharge A come from iron dissolved in groundwater percolating through the site. DER argues that the apparent discrepancy between the iron concentrations in Discharge A and the iron concentrations observed in groundwater unquestionably generated on the site, e.g., the iron concentrations in Discharge B, can be explained by previous (before the water at Discharge B was sampled) loss of dissolved iron to iron precipitates. But DER has not offered any objective evidence to support its claim that the water samples DER took at Discharge B previously had suffered such iron losses. DER did not even filter the samples DER itself took, to see how much of the iron at Discharge B was in the suspended rather than dissolved form. DER has not explained why Discharge B should have lost so much dissolved iron, whereas Discharge A -- with higher alkalinity and pH -- has managed to retain 20-30 ppm of dissolved iron.

DER's other attempts to explain away the discrepancy between the high iron concentrations in Discharge A and the significantly lower iron concentrations in drill holes 1, 2 and 6 are similarly unconvincing, as are DER's other arguments (which we will not discuss in detail) based on water quality analysis of samples taken from drill holes 4 and 7. Especially where DER wishes us to infer the existence of a hydrologic connection DER has been unable to demonstrate by direct hydrogeologic evidence, it is DER's burden to convince us that this inference is reasonable. In the absence of a reasonable explanation of the

aforementioned iron discrepancy, we do not see how we reasonably can conclude, merely from the fact that Discharge A is downhill from the site, that a hydrologic connection between Discharge A and the site must exist. DER's argument (post-hearing brief, pp. 36-7) that the very much larger dissolved iron concentration in Discharge A than in drill hole 7 means the groundwater must be becoming polluted with iron from the site as it flows from drill hole 7 to Discharge A once again begs the question, since the argument assumes the necessary hydrologic connection between the site and Discharge A has been established.

DER, especially in its reply brief, also urges that the hydrologic connection can be inferred from the manganese concentrations in the water samples we have discussed, irrespecitve of the apparent discrepancy in iron concentrations. It is true that for manganese there is no gross discrepancy of the sort just discussed for iron, but once we have concluded that no hydrologic connection between Discharge A and the site can be inferred, so that the iron in Discharge A must be coming from another polluting source than the site, it is reasonable to conclude further that the same polluting source is furnishing the manganese found in Discharge A. Certainly this conclusion is not less reasonable than the conclusion DER urges, namely that a hydrologic connection can be inferred from the manganese data even though such a connection cannot account for the iron data. Correspondingly, DER's view requires us to violate a logical "principle of parsimony", in that we must postulate an unknown source of the iron pollution in Discharge A in addition to accepting DER's (now no more than a) postulate that the mine source is causing Discharge A's manganese pollution.

In summary, after a careful review of the entire voluminous record including the parties' briefs, it is our conclusion that DER has not met its burden of showing that a hydrologic connection between Discharge A and the site

exists, whether on the basis of direct hydrogeologic evidence or on the basis of the circumstantial evidence provided by Discharge A's location and relevant water quality data. In the absence of a showing that there is a hydrologic connection between Discharge A and the site, Hepburnia cannot be held responsible for treating the admitted pollution in Discharge A. DER's order to Hepburnia requiring such treatment was an abuse of DER's discretion.

Before closing, we stress that DER's burden solely has been to show that there exists a hydrologic connection between Discharge A and the site, by which means polluted water from the site is reaching Discharge A. DER does not have the additional burden of showing that water leaving the site has become polluted as a result of Hepburnia's mining activities; it is sufficient that polluted water is reaching Discharge A from a site Hepburnia has mined. 35 P.S. §691.315. Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903; Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974). We also stress that the burden we have set is strongly dependent on the fact that Discharge A does not emanate from a point on the Hepburnia site. If Discharge A had been located on the site, then under §691.315 and applicable precedent there would be no need for DER to establish any hydrologic connection between the discharge and polluted water originating on the site; it would have been sufficient that Hepburnia had "allowed" an unauthorized discharge from a site it had mined. 35 P.S. §691.315; Harmar Coal, supra; Barnes and Tucker, supra; See also Adam Greece d/b/a/ Cherry Run Fuel Co. v. DER, 1980 EHB 135, (Adjudication dated August 8, 1980).

CONCLUSIONS OF LAW

1. Except for the claim that it is not responsible for pollution of Discharge A, all other Hepburnia claims, including due process claims and claims

connected with DER's refusal to issue a permit for Hepburnia's so-called Snyder site, are deemed waived.

2. The availability of discovery under the Board's rules, 25 Pa. Code §21.111, and whether or not the parties have taken advantage of this availability, is irrelevant to the issue of whether the burden of persuasion should be shifted under 25 Pa. Code §21.101(d).

3. The mere fact that a party has had the opportunity to observe the facts referred to in 25 Pa. Code §21.101(d)(2) does not imply that the party "should be in possession" of those facts.

4. Under the facts of this appeal, the burden of proof does not shift to Hepburnia under 25 Pa. Code §21.101(d).

5. Therefore, in this appeal DER bears the burden of proof.

6. In order that DER's order requiring Hepburnia to treat Discharge A be within DER's discretion, DER must be able to show — by the preponderance of the evidence — that there is a hydrologic connection between Hepburnia's mine site and Discharge A.

7. This hydrologic connection can be established by direct hydrogeologic evidence, or by inference from circumstantial evidence such as water analyses data and the location of Discharge A relative to the site.

8. In the absence of other supporting arguments or data, statistical evidence that fracture zones exist in a broad region encompassing the site is insufficient to imply that fracture zones exist on this particular site.

9. Resistivity studies and conclusions therefrom are admissible as a source of information about subsurface layers, but the weight to be given such testimony depends on the apparent reliability of the particular resistivity studies' applications being relied on.

10. DER did not meet its burden of showing the existence of a hydrologic connection between Discharge A and the site, whether by direct hydro-

geologic evidence or by inference from circumstantial evidence.

11. Under the facts of this appeal, DER's order requiring Hepburnia to treat Discharge A was an abuse of discretion.

ORDER

Wherefore, this 28th day of May, 1986, it is ordered that:

1. In the appeal originally docketed at 85-309-G:

a. Insofar as DER's appealed-from order required Hepburnia to treat Discharge A, Hepburnia's appeal is sustained.

b. Insofar as DER's appealed-from order required Hepburnia to treat Discharges B and C, Hepburnia's appeal is dismissed.

2. The appeal originally docketed at 85-343-G is dismissed, but the Board expects that any continued DER delay in processing Hepburnia's mining permits will not be based on Hepburnia's failure to treat Discharge A.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: May 28, 1986
cc: Bureau of Litigation
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For the Commonwealth, DER:
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EMERALD MINES CORPORATION	:	
	:	
v.	:	**EHB Docket No. 84-280-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: May 30, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis:

The Department of Environmental Resources' ("Department") Motion for Summary Judgment is denied because the Department has no clear legal right to summary judgment. Although the material facts are not in dispute, the statutory provision involved is not free from ambiguity, there are no judicial interpretations of it, it is not clear that the Department has consistently interpreted the provision in this manner, and there may be valid reasons for not according deference to the Department's interpretation of the statute. In such circumstances, a grant of summary judgment to the Department is inappropriate.

OPINION

This matter was initiated by the filing of a Notice of Appeal on August 10, 1984, by Emerald Mines Corporation ("Emerald"). Emerald sought review of the report of a Commission appointed pursuant to §123 of the Pennsylvania Bituminous Coal Mine Act, the Act of June 17, 1961, P.L. 659, as

amended, 52 P.S. §701-23 ("Bituninous Coal Mine Act"), at the request of Emerald to determine whether proper clearance was being maintained along conveyor belts in the Emerald No. 1 Mine in Greene County. The Commission, whose report was transmitted to Emerald on July 9, 1984, determined that Emerald was not maintaining the four feet of clearance on one side of the conveyor belt employed in the mine to transport coal required by §273(b) of the Bituminous Coal Mine Act.[1] Emerald contended, inter alia, in its Notice of Appeal that the Department, acting through the Commission, had no authority under the Bituminous Coal Mine Act to impose such a requirement and that the four foot clearance requirement was not reasonably related to the achievement of safe mining conditions.

Thereafter, the parties engaged in extensive discovery which culminated in the filing of a Motion for Summary Judgment by the Department on March 21, 1986. Emerald responded to that motion on April 14, 1986. Most simply put, the Department alleges that there are no material facts in dispute, as Emerald has admitted that in various places along the literally miles of conveyor belt in the No. 1 Mine, there is less than four feet clearance along one side of the conveyor belt. Because §273(b) of the Bituminous Coal Mine Act clearly requires that four feet of clearance be maintained along one side of the conveyor belt and because there are places along the Emerald conveyor belt where less than four feet of clearance existed on one side, the Department reasons that it is entitled to summary judgment. Predictably, Emerald has a rather different view. While it recognizes that there are locations along the conveyor belt in the No. 1 Mine, where less than

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[1] The Commission also found that control lines should be installed along the conveyor belt in a fashion which would permit operation from either side. This issue was subsequently resolved by the parties.

where less than four feet of clearance exist, Emerald contends that it is not in violation of §273(b) of the Bituminous Coal Mine Act because only a total of four feet of clearance on the sides of the conveyor belt is required and that adherence to the Department's interpretation would, in fact, endanger the safety of miners because various supports would have to be removed by Emerald to provide the clearance required by the Department along one side of the conveyor. The parties ably cite various statutory construction tenets to support their interpretations of §273(b). For the reasons set forth below, it is not clear, despite Emerald's indication that there are locations along its conveyor belt where four feet of clearance does not exist on one side, that the Department has a clear right to summary judgment.

This Board has the authority to grant summary judgment when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320, 1322 (1978). A motion for summary judgment is appropriate where the only question is interpretation of a statutory provision. Pa. Mfrs' Assn. Ins. Co. v. Sheppard, 30 Pa.Cmwlth 186, 373 A.2d 760 (1977). In such circumstances, summary judgment will be granted only where the legal right to summary judgement is clear. The American Insurance Company and Firemen's Fund Insurance Company v. DER, 1981 EHB 470. In ruling upon a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party. Ressler v. James Motor Co., Inc., 337 Pa.Super. 602, 609, 487 A.2d 424 (1985), citing First Mortgage Company of Pennsylvania v. McCall, 313 Pa.Super. 54, 459 A.2d 406 (1983).

The statutory provision at issue herein, §273(b) of the Bituminous

Coal Mine Act, provides:

> All conveyor entries shall be provided with a minimum width and height of not less than four feet for travel; but in conveyor entries in which track is installed, the minimum amount of clearance width shall not be less than two and one-half feet, which clearance width shall be continuous throughout the entry. In lieu of maintaining four feet of height in conveyor entries, a minimum height of three feet and a minimum width of four feet may be maintained, provided the operator furnishes a mode of conveyance for men and material other than on the conveyor. All such travel space and clearance space shall be kept free of all forms of obstruction under foot, and free from electric wires and electric cables. A space of not less than four feet in width shall be provided for travel from the immediate entrance of each working place to the face thereof, which space shall be kept free of all forms of obstruction under foot and free from electric wires and electric cables.

The Board has found no judicial decisions interpreting §273(b), so this is a matter of first impression.

The Commonwealth has argued that the language of §273(b) is clear on its face, and, even if it isn't, §1921 of the Statutory Construction Act, 1 Pa. C.S.A. §1921(a)[2] mandates the adoption of the Department's interpretation because the General Assembly's intent in enacting §273(b) and its predecessor in the 1937 Act was to minimize the hazards associated in working around a moving conveyor belt by creating an obstruction free buffer zone. Adoption of this interpretation, the Department argues, would result in a construction of §273(b) which favors the public interest, as required by

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[2] "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly..."

§1922(5) of the Statutory Construction Act, 1 Pa. C.S.A. §1922(5).[3]

Emerald, expectedly, contends that §273(b) is not so unambiguous on its face, noting the language in other related provisions of the Bituminous Coal Mine Act. In support of its position that §273(b) is ambiguous, Emerald cites an analogous provision in the federal Mine Safety Health Administration Regulations, 30 CFR §75.1403-5(g):

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

Emerald also argues that mechanistic adherence to the Department's interpretation of §273(b) may, in some situations, result in the creation, rather than the abolition, of mine safety hazards.

A reviewing body generally will give great deference to an agency's interpretation of the statutes it administers where statutory language is ambiguous. Carol Lines Inc. v. Pennsylvania Public Utility Comm., 83 Pa.Cmwlth 393, 477 A.2d 601 (1984). This is especially true where the agency's interpretation of a statute has been consistent. Pickup v. Sharon City T.A., 86 Pa.Cmwlth 630, 486 A.2d 543 (1985). However, the agency's interpretation may be cast aside where its interpretation is clearly erroneous and there are cogent reasons for so doing. Spicer v. Com., Dept. of Public Welfare, 58 Pa.Cmwlth 558, 425 A.2d 1008 (1981).

The language of §273(b) is not unambiguous, but the Board is

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[3] "In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumptions, among others, may be used:

* * * * *

(5) That the General Assembly intends to favor the public interest as against any private interest."

reluctant to give great deference to the Department's interpretation of the section where it is a matter of first impression and the issue is before us on summary judgment. Because we must view the matter in the light most favorable to the non-moving party, we must take into account Emerald's representations that the Department has not consistently adopted this particular interpretation of §273(b). And, based on the factual assertions in Emerald's response to the motion for summary judgment, there may be valid and cogent reasons related to mine safety not to accord deference to the Department's interpretation of §273(b) of the Bituminous Coal Mine Act. For these reasons, it is inappropriate to grant summary judgment.

ORDER

AND NOW, this 30th day of May , 1986, it is ordered that the Department's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: May 30, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
William Larkin, Esq.
Western Region
For Appellant:
R. Henry Moore, Esq.
ROSE, SCHMIDT, CHAPMAN, DUFF & HASLEY
Pittsburgh, PA

bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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BRADFORD COAL COMPANY :

:

: Docket No. 83-061-G
: (issued June 4, 1986)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant's motion to dismiss several DER compliance orders at issue in this consolidated appeal is denied. The protection of the 5th Amendment double jeopardy provision is applicable only to proceedings which are essentially criminal in nature. It is not applicable to proceedings such as the instant one which concern DER actions whose purpose is purely remedial, not punitive.

OPINION

This is a consolidated appeal of five orders issued by the Department of Environmental Resources ("DER") to Bradford Coal Company ("Bradford"). The first of the orders was issued on February 1, 1980. This order directs Bradford to replace certain water supplies and to treat discharges which DER alleged were in violation of the Clean Streams Law, 35 P.S. §691.1 et seq., the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., and the regulations promulgated pursuant thereto. Subsequent to the order of February 1, 1980 DER issued four additional compliance orders, each of which direct Bradford to treat the discharges which are the subject of the February 1, 1980. The fourth order, dated

March 29, 1985 also directed Bradford to cease its mining operations at the site at issue (the Bear Hill Mine).

Bradford has moved for dismissal of all orders[1] issued after the February 1, 1980 order on the basis that they represent multiple punishment for the same course of conduct in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. DER has filed a response in opposition to Bradford's motion.

The double jeopardy provision of the Fifth Amendment is made applicable to the States by virtue of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). The right guaranteed by that provision, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb", is applicable only to proceedings which are "essentially criminal". Breed v. Jones, 421 U.S. 519 (1975); U.S. ex rel. Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). In Breed the Supreme Court looked to the purpose and the potential consequences of the state's action to determine whether the proceeding at issue was essentially criminal. It held that where the purpose is to authorize criminal punishment or to vindicate criminal justice and the potential consequences of the proceeding include a penalty such as incarceration or the imposition of the stigma associated with a finding that one has engaged in criminal or delinquent conduct, the proceeding should be treated as essentially criminal so that double jeopardy guarantees are applicable. The issue in Breed was whether certain proceedings in juvenile court were essentially criminal; the Court concluded that they were where the individual could be incarcerated as a consequence of the proceeding, holding that there was little basis upon which to distinguish the

1. Bradford has requested that the Board dismiss five orders issued by DER to Bradford after February 1, 1980. Only four of the five orders are before us here, however. The fifth order, issued on June 3, 1985, was appealed by Bradford at EHB Docket No. 85-278-M. That appeal was dismissed as untimely filed by order of the Board dated November 13, 1985.

proceedings from the typical criminal prosecution.

In contrast with the situation presented in Breed, the Court has held that where the purpose of the state proceeding is essentially remedial, and the potential consequence thereof is the imposition of a civil sanction, the double jeopardy provision does not apply. In One Lot Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232 (1972) the Court held that proceedings brought to forfeit goods brought into the United States without having been declared to Customs officials were not essentially criminal because the purpose of forfeiture was remedial, i.e., to reimburse the government for the harm caused by violation of its inspection laws. The Court noted that the issue of whether a given sanction is to be treated as civil or criminal is one of statutory construction. 409 U.S. at 237. See also U.S. ex rel. Marcus v. Hess, 317 U.S. at 549.

We have no hesitation concluding that the proceedings with which we are concerned here are not essentially criminal. DER has directed Bradford to abate discharges which DER contends are causing pollution of the waters of the Commonwealth. The purpose is purely remedial, not punitive. The DER orders simply direct Bradford to correct a condition which DER alleges constitutes a violation of the Commonwealth's mining laws. No sanction whatsoever has been imposed.

There is nothing improper per se in DER's issuance of consecutive orders directing abatement of a single set of continuing discharges. Under the applicable statutes, each day a discharge exists in violation of applicable effluent limitations constitutes a separate violation of law. 35 P.S. §691.605; 52 P.S. §1396.22. Commonwealth, DER v. Lawrence Coal Company, EHB Docket No. 81-021-CP-M (Adjudication dated May 27, 1986).

DER certainly possesses the authority to assess a civil penalty for

violations of the mining laws. 35 P.S. §691.605; 52 P.S. §1396.22. No such action is before us here, however. Moreover, the imposition of a civil penalty is not equivalent to a criminal proceeding. In enacting the Clean Streams Law and the Surface Mining Act the legislature provided for the imposition of criminal sanctions as well as civil penalties, indicating that it intended to draw a distinction between penalties of a remedial nature and these that are punitive. We conclude that the matters at issue are not "essentially criminal." Therefore, Bradford's motion must be dismissed since the protection of the Fifth Amendment double jeopardy provision is inapplicable.

ORDER

WHEREFORE, this 4th day of June, 1986, it is ordered that Bradford Coal Company's Motion to Dismiss compliance orders is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: June 4, 1986
cc: Bureau of Litigation
Timothy Bergere, Esq.
William Kriner, Esq.
Dwight Koerber, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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B & D COAL COMPANY :

:

: Docket No. 86-137-G
: Issued June 5, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

DER's Motion to Dismiss is denied. DER contends that it has taken no appealable action here. The Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. (the "Surface Mining Act") imposes upon DER the duty to take action on applications for release of bonds posted in conjunction with surface mining operations. Thus, there is a corresponding right on the part of the bond release applicant to have a decision made on said applications. DER's failure to make such a decision affects the applicant's right. Therefore, the failure to act is an appealable action.

OPINION

On March 10, 1986 B & D Coal Company ("B&D") filed an appeal with the Board from the alleged refusal or failure of the Department of Environmental Resources ("DER") to act upon completion reports submitted by B&D seeking release of bonds posted in connection with its mining permits. DER filed a motion to dismiss the appeal arguing that it had taken no action affecting the rights, duties or liabilities of B&D and that therefore the Board lacked jurisdiction over the appeal. In an opinion and order entered at this docket number on April 25,

1986 we noted that the Board only has jurisdiction to review actions of DER as defined in 21.2 of the Board's rules, 25 Pa.Code §21.2,[1] and held that where DER is under a duty to act and fails to do so, this failure may be deemed an appealable "action" if it would affect the rights, duties, liabilities or privileges of the party seeking review. It was unclear, however, whether the Notice of Appeal filed with the Board on March 10, 1986 set forth sufficient allegations which if proved would establish a duty to act on the part of DER. Specifically, the Notice of Appeal failed to state whether B&D had complied with the procedural requirements associated with applications for bond release. Therefore, the Board granted B&D leave to amend its Notice of Appeal. B&D has done so.

The amended Notice of Appeal alleges that DER has failed to act upon eight applications for bond release filed with DER between April 8, 1975 and July 8, 1983. B&D states that it has complied with the requirements of the Surface Mining Act, 52 P.S. §1396.4(b), and 25 Pa.Code §86.171 concerning applications for bond release. Although given the opportunity, DER has not amended its Motion to Dismiss or otherwise responded to the amended Notice of Appeal.

We begin with the three applications for bond release which B&D states were filed with DER after October 10, 1980. As of that date the Surface Mining Act was substantially amended. (P.L. 835, No. 155 (effective immediately)). Act 155 amended the portion of the statute governing bond release to read as follows:

> The applicant shall give public notice of every application for a bond release under this act in a newspaper

1. 25 Pa.Code §21.2 defines "action" as any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person.

> of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks . . . . In all cases involving surface coal mining operations, any person having an interest which is or may be adversely affected shall have the right to file written objections to the proposed . . . bond release within thirty (30) days after the last publication of the above notice. Such objections shall immediately be transmitted to the applicant by the department. If written objections are filed and an informal conference requested, the department shall then hold an informal conference in the locality of the surface mining operation. If an informal conference has been held, the department shall issue and furnish the applicant for a . . . bond release and persons who are parties to the administrative proceedings with the written finding of the department granting or denying the . . . bond release in whole or in part and stating the reasons therefor, within sixty (60) days of said hearings. If there has been no informal conference, the department shall notify the applicant for a bond release of its decision within sixty (60) days of the date of filing the application. Section 5 of the Act of October 10, 1980, P.L.835, No.155 (current version at 52 P.S. §1396.4(b)).

The Act of October 12, 1984, P.L. 916, No. 181, §2 amended the foregoing provision. 52 P.S. §1396.4(b) now provides that the public comment period on application for bond release closes thirty days after the last publication of the application for release, and that where an informal conference or public hearing has been requested within the public comment period, DER must notify the applicant for release of its decision on the application within thirty days of the date of such conference or hearing, rather than the sixty days prescribed by Act 155. Where there has been no conference or hearing, however, the time limits specified by presently effective section 1396.4(b) are the same as those imposed under Act 155, i.e., DER is to notify the applicant of its decision within sixty days of the filing of the the application for bond release.

When ruling on a motion such as the instant one, which we have been treating as a motion for judgment on the pleadings, we must accept as true all

well pleaded allegations of the opposing party. Goodrich Amram §1034(b):1. B&D's amended Notice of Appeal states that it published notice of its applications for bond release for four consecutive weeks in local newspapers as required by the Surface Mining Act, but that no written objections were filed and no informal conferences or public hearings were requested. In light of these allegations we conclude that with regard to applications for bond release filed after October 10, 1980, DER was under a duty to act upon said applications within sixty days of their filing. That is, DER was to inform the applicant within sixty days of the date of filing whether or not the bonds would be released as requested. DER has admitted that it has not acted upon B&D's applications; in its Motion to Dismiss it states that it is reviewing the applications but that no final action has been taken.

The statutory grant of jurisdiction to the Board contained in 71 P.S. §510-21, as well as the Board's rules, 25 Pa.Code §§21.2 and 21.52(a), contemplate that the Board will review actions of DER. These provisions are silent with regard to the reviewability of DER inaction. It is apparent, however, that the primary concern in determining whether the Board should exercise jurisdiction over a given matter is whether rights, duties, privileges and the like of a party are being affected. (See 25 Pa.Code §21.2, quoted at footnote 1, supra) If they are being affected, then the party should have available to it a mechanism for review, i.e., an appeal to this Board. In the present case section 1396.4(b) of the Surface Mining Act clearly imposes upon DER the duty to act upon an application for bond release within sixty days of the date of filing the application (where no informal conference or public hearing has been requested). It goes without saying that there is a corresponding right on the part of the bond

release applicant to have DER make a decision on the application within that sixty day period. Thus, the failure of DER to make such a decision within the sixty day period affects the applicant's rights. Consequently, this failure must be deemed an appealable action. We conclude that with regard to the applications for bond release which B&D filed after October 10, 1980, DER's Motion to Dismiss must be denied.

B&D's amended Notice of Appeal states that it also submitted five applications for bond release to DER between April 8, 1975 and November 15, 1978, and that DER has failed to act upon any of these. Prior to the 1980 amendments to the Surface Mining Act and throughout the period from April, 1975 through November, 1978, the language of the Act concerning applications for bond release read as follows:

> As the operator completes each separate step of the approved reclamation plan, he may report said completion to the department and request the release of that portion of the bond and collateral which relates to the completed portion of the reclamation plan. Upon the receipt of such notification and request, the secretary[2] shall cause the premises to be inspected, and if he finds that the work has been performed in a proper and workmanlike manner and is in compliance with the approved reclamation plan and with the law applicable, he shall release that portion of the bond and collateral which relates to the completed portion of the reclamation plan: Provided, however, that the secretary may withhold an amount equivalent to five per cent of said amount for a period of five years from the completion date of said work, as a contingency allowance for the reimbursement of the Commonwealth of any cost encountered due to after-discovered faulty or negligent work on the part of the operator.
> Section 4(d) of the Act of November 30, 1971. (P.L. 554, No. 147)

Unlike the provisions of section 1396.4(b) as they existed after the 1980 amendments, the pre-1980 Act did not require DER to make a decision upon

2. References to the "secretary" are to the Secretary of the Department of Environmental Resources. Section 1 of the Act of November 30, 1971 (P.L. 554, No. 147).

a bond release application within a specific time period. There is no question, however, that the quoted provision did impose a duty upon DER to make a decision regarding such applications; upon receipt of a request for release the secretary "shall cause the premises to be inspected" and if reclamation has been properly performed, he "shall release" the appropriate portion of the bond. Although the legislature did not impose specific time period requirements concerning decisions upon requests for bond release, we assume that in enacting section 4(d) the legislature did intend that DER would act within a reasonable time. Certainly the legislature did not intend that DER indefinitely would defer its decision.

B&D alleges that it submitted completion reports to DER in connection with requests for bond release on April 8, 1975 and November 15, 1978. DER admits it has not acted upon these requests. We conclude that, as a matter of law, DER has failed to act within a reasonable time with regard to these requests for release. The passage of twelve years and seven and a half years respectively with no decision from DER concerning pending requests for release cannot be consistent with the intent of the legislature in enacting section 4(d). We conclude that on the basis of the pleadings before us it appears DER has failed to carry out its statutory duty to make a decision concerning B&D's requests for bond release and thus has affected B&D's right to have such a decision made. Therefore, we deem the failure to act to be appealable and deny DER's Motion to Dismiss with regard to the bond release applications filed with DER prior to October 10, 1980.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that DER's Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

DATED: June 5, 1986

Edward Gerjuoy, Member

cc: Bureau of Litigation
Timothy J. Bergere, Esq.
Leo M. Stepanian, Esq.

COMMONWEALTH OF PENNSYLVANIA

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RIGHT OF WAY PAVING COMPANY, INC.

:

:

: Docket No. 86-079-G

: Issued June 5, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

The petition to intervene filed by the surety on the bonds which are at issue in this bond forfeiture appeal is provisionally denied. The interests of the surety and the principal on the bond appear to be identical. Therefore, the requirements of 25 Pa.Code §21.62 have not been met, i.e., the petitioner has failed to show that its interests will not be adequately represented in this appeal. The petitioner, however, may renew its petition for intervention if, at a later stage of these proceedings, it becomes apparent that intervention is necessary to adequately protect its interests.

OPINION

On April 25, 1986 this Board issued an Opinion and Order concerning a petition by the American Insurance Company ("AIC") requesting permission to intervene in the above-captioned appeal. The Board rejected AIC's petition, but gave AIC leave to file an amended petition, more consistent with the requirements for intervention enunciated in the Board's rules and regulations, 25 Pa.Code §21.62. AIC has filed its amended petition, on which we now rule.

The facts underlying these AIC petitions to intervene have been adequately recounted in our April 25, 1986 Opinion and Order, and need not be re-detailed here. Briefly, Right of Way ("ROW") has appealed DER's intention to forfeit a number of surface mining bonds including Surety Bond 2453829, because of ROW's alleged violations of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. AIC is the surety on the just-cited bond. AIC, though notified of DER's intention to forfeit the bond, failed to timely appeal. AIC therefore has petitioned to intervene in this matter, for the following reasons (we quote verbatim from AIC's amended petition to intervene):

> (A) The American Insurance Company is equally liable if a violation is found and will be called upon to pay any forfeiture if one is found;
>
> (B) The American Insurance Company will present evidence that the area had been restored and the bond should not be forfeit and such other defenses as discovery may establish;
>
> (C) While the interest of the American Insurance Company is in many ways similar to Right of Way Paving Company, Inc., the interests of the two are not the same specifically:
>
> > (1) The ownerhsip of Right of Way Paving Company, Inc. has changed since the bond was written which bears on how the defense will be presented and the degree of cooperation by all with full knowledge of the facts.
> >
> > (2) Right of Way Paving Company, Inc., had other bonds not issued by the American Insurance Company forfeited on the same day as our bond. What might be an attractive defense tactic or settlement resolution to Right of Way Paving Company, Inc., considering all bonds, might be most prejudicial to the American Insurance Company.
> >
> > (3) It is possible that the financial strain of these cases on Right of Way Paving Company, Inc., could require them to seek the protection of the Bankruptcy Court or not be financially able to properly present its defense.

> (4) On many occasions defendants which appear in legal theory to have a common interest do not because of practical realities. While the American Insurance Company cannot anticipate what may transpire at trial, it is sure that it is more able than others to provide a defense that is in its best interest.

AIC also argues that intervention should be allowed because (AIC alleges) its notice of appeal was untimely filed only because the mail from Pittsburgh to the Board headquarters in Harrisburg was unexpectedly and excessively delayed.

We begin by dealing with this last contention of AIC's. As DER argues, and as we have stated in our April 25, 1986 Opinion and Order, "intervention cannot be employed to obviate the deserved consequences of failure to file a timely appeal." Whether or not AIC's failure to file a timely appeal was caused by unexpected postal system delays, the fact that AIC's own appeal of the bond forfeiture letter was dismissed on grounds of untimeliness now is res judicata. We see nothing in the rules for intervention -- the Board's rule 25 Pa.Code §21.62 or the Pa.Rules of Civil Procedure Rule 2327 -- to suggest that intervention should be more leniently allowed when the petitioner (for whatever reason) has not timely appealed. Therefore, AIC's petition to intervene will be adjudged solely on its petition's merits, wholly irrespective of the history of AIC's own attempts to appeal DER's forfeiture letter.

Turning now to AIC's above-quoted reasons for requesting intervention, we agree with DER that AIC has not satisfactorily demonstrated that its intervention is required to adequately represent its interest in this bond forfeiture appeals even under the minimal standards the Board imposes for such a showing. Sunny Farms, Ltd. v. DER, Docket No. 81-046-H, 1982 EHB 442. AIC's interests are concerned only with bond 2453829, not with any other ROW bonds DER may be proposing to forfeit; if permitted to intervene, AIC's participation in this appeal would be limited to issues concerning this bond. As to this bond, surety law indicates

that the interests of AIC and ROW are identical. Robert L. and Joseph Snyder et al. v. DER, Docket No. 79-201-B, 1980 EHB 437. Moreover, the agreement between a principal and its surety normally gives the surety complete rights to control litigation involving the principal which might endanger the surety's bond; AIC has given the Board absolutely no reason to believe that it does not have such rights in the present appeal.

This said, we also say that we are aware the assertions at the end of the previous paragraph about AIC's ability to control the litigation involving the proposed forfeiture of its surety bond are conjectural, and that as the litigation in this appeal develops AIC's proffered reasons quoted supra may turn out to be more meritorious than presently appears. Therefore, we provisionally deny AIC's petition to intervene, but do not make this ruling final. AIC's counsel can observe the progress of this litigation, especially the conduct of ROW's counsel at the hearing on the merits of this matter. Even after the hearing on the merits begins, the Board will permit AIC to renew its petition if AIC believes the course of events have strengthened its reasons for intervention, to the point where the Board's standards under §21.62 indeed will be met. Because the Board is deferring a final ruling on AIC's petition, AIC's rights of intervention under §21.62(a) will not lapse when the hearing on the merits of this appeal begins.

ORDER

WHEREFORE, etc. this 5th day of June, 1986 AIC's petition to intervene is provisionally denied for reasons given in the accompanying Opinion; however, AIC may renew its petition at any time, even after the hearing on the merits of this appeal has begun, if AIC believes the course of events has shown that its intervention indeed is required to adequately represent its interest in this

bond forfeiture appeal. The parties are to serve on AIC copies of all documents filed with the Board. The Board will accept no filings from AIC other than a renewal of its petition for intervention.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: June 5, 1986

cc: Bureau of Litigation
For Appellant:
Gregg M. Rosen, Esq.
Pittsburgh, PA

For the Commonwealth, DER
Joseph K. Reinhart, Esq.
Western Region

For the would-be Intervenor:
Robert F. McCabe, Jr.
LINDSAY, McGINNIS, McCANDLESS
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ELDRED TOWNSHIP PLANNING COMMISSION	:	
	:	
V.	:	**Docket No. 85-511-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EASTERN INDUSTRIES, INC., Permittee	:	**Issued: June 6, 1986**

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis

A township planning commission established under Pennsylvania Municipalities Planning Code 53 P.S. §10101 et seq. is an advisory agency of the municipality, subordinate to the Township Supervisors, and lacks any independent appealable interest. A party seeking to appeal a DER action must: (1) have a substantial interest in the subject matter of the litigation; (2) the interest must be direct; and (3) the interest must be immediate and not a remote consequence.

OPINION

Eldred Township Planning Commission (Appellant) filed the above-captioned appeal on June 12, 1985 from Mine Drainage Permit #4579601A1 and Mining Permit #300734-4579601-07-3. The Department of Environmental Resources (DER) issued said permits on May 10, 1985 to Eastern Industries, Inc. (Permittee). On December 19, 1985 the Board granted Permittee's Petition to Intervene in

this appeal.[1] Due to error on the part of Appellant and some confusion on the part of the Board, this appeal was not perfected until on or about February 20, 1986 [See the Board's Opinion and Order in the above-captioned appeal issued February 10, 1986]. On March 20, 1986 Permittee filed a Motion to Dismiss Due to Lack of Standing. This was followed on March 27, 1986 with a supporting memorandum of law. Appellant filed Objections to said motion on April 14, 1986. The Board here rules on said Motion to Dismiss for Lack of Standing.

The above-captioned appeal has been complicated from the start because of a separate appeal of the same permits. At EHB Docket No. 85-226-M, the "Township of Eldred" through the Eldred Township Board of Supervisors and the Township Solicitor filed an appeal of said permits on June 7, 1985. The Township perfected its appeal on June 13, 1985. Permittee was also an intervenor in the Township's appeal. The Township's appeal came to a close after Permittee filed a Motion for Summary Judgment on November 22, 1985 and the Township responded by a letter from the Township Solicitor, Linda Wallach Miller, dated January 16, 1986, stating that the Township no longer wished to pursue the appeal and would thus not file any objections to the Motion for Summary Judgment. The Board thus dismissed the Township's appeal in an order dated February 14, 1986.

Permittee's Motion to Dismiss for Lack of Standing is based on Permittee's claim that Appellant is only an advisory agency of the municipality and that it does not have the authority to engage in an appeal such as is here present. Thus, Permittee claims that Appellant does not meet the

---

[1] Although the Board did grant Permittee's Petition to Intervene in this matter, Rule 21.51(g) of our rules automatically confers party status on permittees. In the future, the Board will not consider such petitions filed by permittees who are properly served with the notice of appeal.

interest requirements necessary to give a party the standing to appeal.

Appellant's Objections to Permittee's Motion to Dismiss for Lack of Standing present very little of substance concerning the issues raised by the motion to dismiss. The Board, keeping in mind that Appellant is bringing this action pro se, has fastidiously examined the issues raised in Permittee's motion. However, the Board finds it must agree with Permittee and dismiss for lack of standing.

The question of standing is rooted in the notion that for a party to maintain a challenge to an official action, he must be aggrieved in that his rights have been invaded or infringed. Franklin Township v. DER, 499 Pa. 162, 452 A.2d 718 (1982). The courts have repeatedly stated that for a party to have standing he must: (1) have a substantial interest in the subject matter of the litigation; (2) the interest must be direct; and (3) the interest must be immediate and not a remote consequence. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), Franklin supra. It is not sufficient for the party claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law. Franklin supra. To have standing a party must show that it is its own interests which are at stake. Wm. Penn, supra. Were it the Township which was prosecuting this appeal, there would be little question as to their standing to appeal. However, that is not the present situation.

Permittee argues that Appellant is not an entity which has the right or authority to appeal an action of DER. The Board finds it must agree. The question appears to be one of first impression before this Board. Appellant is a "planning agency" formed under the authority granted by the Pennsylvania Municipalities Planning Code (MPC). 53 P.S. §10101 et seq. As such, a planning commission is an agency of the municipality. Mosside Associates,

LTD. v. Zoning Hearing Board of the Municipality of Monroeville, 70 Pa. Cmwlth. 555, 454 A.2d 199 (1982). The individual powers of a planning commission, such as they are, are defined in 53 P.S. §10209.1. These powers do not include the right to sue or be sued. See, 53 P.S. §10209.1.[2] Under the MPC a planning commission is intended to have advisory power only and its recommendations have no binding effect. 53 P.S. §10105, See Heck v. Zoning Board for Harvey's Lake, 39 Pa. Cmwlth. 570, 397 A.2d 15 (1979), Todrin v. Board of Supervisors of Charlestown Township, 27 Pa. Cmwlth. 583, 367 A.2d 332 (1976).

Appellant appears to be trying to claim an interest as the representative of the Township. However, it is the Board of Supervisors with the aid of the Township Solicitor which is the legal representative of the Township. Under the MPC the legal matters of a township are in the exclusive realm of the Township Solicitor unless otherwise authorized by the Board of Supervisors. 53 P.S. §65581. In the present situation there has been no indication that the Board of Supervisors support Appellant's appeal; to the contrary they have exercised their rights by appeal and withdrawal. It appears evident as seen by said withdrawal that the legal representatives of the Township do not wish to pursue this appeal. The Board has no jurisdiction to review and determine the propriety of these types of actions by the Township Supervisors. Buckingham Township Civic Association v. DER and Estate of Mary T. Young, 1977 EHB 236. As noted above a planning commission such as Appellant is only a subordinate advisory agency of the municipality. See, Blue Ridge Realty v. Lower Paxton Township, 51 Pa. Cmwlth. 349, 414 A.2d 737

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[2] The Board notes that the power to sue and the obligation to be sued are generally specifically enumerated in a statute, such as in the Municipality Authorities Act [53 P.S.§306(B)(b)], the Second Class County Code [16 P.S. §3202(2)], and the Uniform Condominium Act [68 Pa. C.S. §3302(a)(4)].

(1980), and Heck, supra.

Further, the permits which Appellant here appeals were issued under the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act). 52 P.S. §3301 et seq. The Noncoal Act does not specifically incorporate a right of appeal, so appeals brought under the Noncoal Act are governed by the general appeal provisions of the Administrative Code. 71 P.S. §510-21(c). The Administrative Code provides that, "no such action of the Department [DER] adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board." 71 P.S. §510-21(c). The Noncoal Act defines a person as, "any natural person, partnership, association, corporation or municipality or any agency, instrumentality or entity of federal or state government." 52 P.S. §3303. As a subordinate agency of a municipality a planning commission does not fit within this definition. See, Mosside Associates, supra. The Board also believes that a planning commission is not an entity or person with a right to appeal within the Board's rules and regulations since a planning commission is simply an advisory body with no independent appealable interest of its own. 25 Pa. Code §21.2. The Board concludes that, while a municipality, in various circumstances, may have a right of appeal, Appellant is not an entity which has the right or authority to appeal an action of DER under the Noncoal Act.

Since Appellant can not represent the interests of the municipality and Appellant does not appear to have any independent interests involved here, the Board must conclude that Appellant's interest does not differ from the abstract interest of all citizens in having others comply with the law. Wm. Penn, supra. Lacking a substantial interest in the matter concerned, Appellant lacks proper standing to pursue an appeal. Wm. Penn, supra. Thus

the Board must dismiss the above-captioned appeal for lack of standing.

Finally, contrary to what Appellant apparently believes, the fact that the Board initially docketed this appeal coupled with Permittee's actions up to this point, does not confer standing upon Appellant. See, Robert L. Anthony v. DER, 1976 EHB 334.

ORDER

AND NOW, this 6th day of June, 1986, for the reasons stated above, this appeal is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For Appellant:
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For Permittee:
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DER - Central

DATED: June 6, 1986

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EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

SHIRLEY ANDERSON	:	
	:	
	:	
V.	:	**Docket No. 85-245-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EASTERN INDUSTRIES, INC., Permittee	:	Issued: June 6, 1986

OPINION AND ORDER

Synopsis

A petition for reconsideration of the Board's dismissal of an appeal is denied. Petitioners were not the party appellant and presented no reasons other than Appellant's purported assignment to them of her right to pursue the appeal and Appellant's failure to apprise them of the status of the appeal as grounds for reconsideration. The petition, which was also untimely, failed to satisfy the requirements of Rule 21.122(a). The petition was also reviewed in light of the standards for the grant of an appeal nunc pro tunc and found to be deficient.

OPINION

By notice of appeal dated June 17, 1985, Shirley Anderson challenged the Department of Environmental Resources ("Department") issuance of a permit to Eastern Industries Inc. ("Permittee") to conduct non-coal surface mining at a site in Eldred Township, Monroe County. For reasons recounted in an opinion and order dated January 14, 1986, the Board dismissed Anderson's appeal with

prejudice. On April 9, 1986, Vernon A. Barlieb and Robert Silfies, Jr. ("Petitioners") petitioned the Board to reconsider its dismissal of the Anderson appeal.

As part of their grounds for reconsideration, Petitioners allege that John and Shirley Anderson executed an assignment on November 15, 1985, which provides:

> Dated: Nov. 15, 1985
>
> FOR VALUE RECEIVED, the receipt whereof is hereby acknowledged, and intending to be legally bound hereby, JOHN F. ANDERSON and SHIRLEY A. ANDERSON, husband and wife, of 12 Cindy Lane, P. O. Box 184 Holmder, N. J. 07733, the undersigned, jointly and severally, hereby bargain, sell, assign and transfer to VERNON A. BARLIEB and ROBERT W. SILFIES, SR., hereinafter referred to as "Assignees", all right, title and interest, actions and causes of action, in and to and appertaining to all of those tracts or pieces of land situate in the Township of Eldred, County of Monroe and Commonwealth of Pennsylvania, heretofore granted and conveyed to Assignees by the said John F. Anderson and Shirley A. Anderson, husband and wife, and the right, either in Assignees name or in the names of the undersigned, to take legal proceedings to enforce all the right, title, interest and remedies pertaining to the herein referred to property, with full right in Assignees to discharge the same.

Petitioners also argue that they received assurances from the Andersons that all available information concerning the appeal had been provided to Petitioners; that they received, on or about February 10, 1986, from Mark A. McClellan, Chairman of the Citizens Advisory Counsel to the Department, a copy of a letter to McClellan from Ernest F. Giovannitti, Director of the Department's Bureau of Mining and Reclamation, advising McClellan that the Anderson appeal was still pending before the Board; and that the Department had not been responsive to Petitioners' questions regarding the permit at issue. Apparently, Petitioners had first learned that the Anderson appeal had been dismissed on March 29, 1986, when, during a meeting between Petitioners and the Department, a telephone inquiry concerning the status of

the appeal was made to the Board.

Permittee opposes the request for reconsideration, urging the Board that the request was not timely filed in accordance with Rule 21.122 of the Board's rules of practice and procedure. Petitioners' legal status is also questioned by Permittee. In the alternative, Permittee argues that if the Board were to regard the petition as one for allowance of an appeal nunc pro tunc, Petitioners have failed to demonstrate entitlement. For the reasons recounted below, the petition for reconsideration is denied.

Rule 21.122(a) of the Board's rules of practice and procedure provides

> (a) The Board may on its own motion or upon application of counsel, within 20 days after a decision has been rendered, grant reargument before the Board en banc. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:
>
> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

Since the petition was filed nearly three months after the Board's dismissal of the appeal, it is untimely. And, even if the petition were timely filed, no reasons cognizable by the Board were offered as grounds for reconsideration. John E. Kaites et al. v. DER, Docket No. 84-104-G (opinion and order issued March 14, 1986).

Petitioners' real reasons for reconsideration relate to Anderson's failure to notify them of the status of this appeal. The assignment purporting to transfer Anderson's right to pursue this appeal was executed on

November 15, 1985. At that point, Anderson's counsel had already received several notices from the Board regarding Anderson's failure to comply with Board orders. And, Permittee had recently filed a motion for sanctions against Anderson.

The Board has not previously addressed the issue of assignments of rights to pursue an appeal. We do believe that we are without authority under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, to construe the assignment from the Andersons to the Petitioners, Donald T. Cooper and Kathleen Cooper v. DER, 1982 EHB 250. We are troubled by such assignments because of the jurisdictional requirements in our rules of practice and procedure and because such assignments could, in some instances, operate to defeat the requirement that challenges to Department actions be filed with the Board within 30 days of receiving notice of the Department action.

Our jurisdictional requirements aside, there are procedural problems associated with such assignments. Our rules do not contain procedures to address such situations, and the Pennsylvania Rules of Civil Procedure relating to substitution and joinder are not applicable to the Board. 25 Pa. Code §21.64(a). Nevertheless, using these rules as a guide illustrates an additional reason why the Petition for Reconsideration must fail. If an action is commenced in the name of a plaintiff who thereafter transfers his interest in the action, the action may continue in the name of the original plaintiff, or the transferee may be substituted as a plaintiff or joined with the original plaintiff. 3 Standard Pennsylvania Practice 2d §4.24. If substitution is to occur, Rules 2351-2375 Pa. R.C.P. would require the filing of a statement of the material factor on which the right to substitution is based. Substitution must also be exercised in a timely fashion. Huffman v.

Stiger, 1 Pitts. Rep. 185. Substitution could hardly be timely exercised if the underlying cause of action was extinguished, as in this matter.

If we were to construe Petitioners' request as a petition for the allowance of an appeal nunc pro tunc, the petition must still be denied. Petitioners have alleged no action on the part of the Board which could be characterized as fraud or misrepresentation. Nor have Petitioners alleged any breakdown in the Board's procedures which has led to Petitioners' current dilemma. Delta Mining, Inc. v. DER, Docket No. 85-484-G (opinion and order issued May 1, 1986). The Board repeatedly informed Ms. Anderson, through her counsel, of her obligations to comply with Board orders and the consequences of failure to comply with Board orders. The Board had no obligation or authority to inquire into Anderson's other legal affairs. Thus, any claim to allowance of an appeal nunc pro tunc must fail.

ORDER

AND NOW, this 6th day of June, 1986, it is ordered that the Petition for Reconsideration filed by Vernon Barlieb and Robert Silfies, Jr. at Docket No. 85-245-M is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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DER - Central

DATED: June 6, 1986

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER
M. DIANE SMITH
SECRETARY TO THE BOARD

NORTHAMPTON, BUCKS COUNTY, MUNICIPAL AUTHORITY	:	
V.	:	**DOCKET NOS. 83-062-M and 84-362-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

ADJUDICATION

Syllabus

The Appellant municipal authority challenged the Department of Environmental Resources' ("DER" or "Department") determinations, pursuant to 25 Pa. Code §103.25(e)(1), that certain interceptors were not eligible for inclusion in the base for determining the authority's subsidy under the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §§701-703 ("Act 339"). Appellant contended that 25 Pa. Code §103.25(e)(1) was invalid per se or, in the alternative, invalid as applied.

The Board held that the regulation was entitled to a presumption of validity and that the Environmental Quality Board's ("EQB") definition of "intercepting sewers which are an integral part of the treatment facilities as that portion of the interceptor between the sewage treatment plant and the first connection" is both consistent with Act 339 and reasonable. The Board further distinguished the instant appeal from previous appeals relating to criteria for determination of subsidies under Act 339 and upheld the Department's determinations of eligibility.

INTRODUCTION

Northampton, Bucks County Municipal Authority filed the above-captioned appeals from decisions by the Department pertaining to state subsidies for the years 1981, 1982, and 1983 for sewage facilities in Northampton Township.[1] The appeals were consolidated for hearing, and a hearing was held on April 19, 1985.[2] The parties have filed briefs, and this matter is ready for adjudication.[3]

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[1] The appeal at 83-062-M was from decisions pertaining to applications for subsidies for the years 1977 through 1981. The appeal at 84-362-M was from a decision pertaining to applications for subsidies for 1982 and 1983. The Authority and the Department entered into a comprehensive settlement agreement regarding the appeals of the decisions for the years 1977, 1978, 1979, and 1980. The settlement agreement does not affect the subsidy awards for subsequent years. The Authority also filed a timely appeal to the Board from the Department's decision on an application for a subsidy for the year 1984, and that appeal is docketed at 85-415-M. Although 85-415-M was not consolidated with the instant appeals, the 1984 application for subsidy is in all respects identical to the applications for 1981-1983, and the parties have agreed that the Board's decision in the instant appeals will be binding on them for the 1985 appeal.

[2] The Authority also appealed from the Department's decision on an application for subsidy for the year 1976 (77-211-M). Although this appeal was settled, a hearing was held on March 8, 1982, and the parties have stipulated that the transcript of the hearing in the appeal at 77-211-M will be part of the record in the instant appeals.

[3] This matter was originally assigned to former Board Member Anthony J. Mazullo, Jr., who resigned from the Board on January 31, 1986. The case was reassigned to Board Member Edward Gerjuoy. Board Chairman Maxine Woelfling has not participated in the review of this matter or the process by which this adjudication is being issued because of a conflict created by her former position with the Department of Environmental Resources as Director of the Bureau of Regulatory Counsel. Since there are at present only two members of the Board, Board Member Gerjuoy, by letter dated April 7, 1986, requested the parties to file any objections to a final disposition of this matter by him alone, and the Board received no objections.

FINDINGS OF FACT

1. Appellant is the Northampton, Bucks County Municipal Authority (hereinafter "NBCMA"), a municipal authority created by Northampton Township (hereinafter "Township"), Bucks County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, DER, the agency of the Commonwealth authorized to administer the provisions of Act 339.

3. The Township does not have its own sewage treatment plant, and sewage from the Township is conveyed through interceptors in the Township to the Neshaminy Interceptor in Lower Southampton, which conveys the sewage to the Philadelphia Northeast Treatment Works for treatment and disposal.

4. NBCMA filed with the Department timely applications for the years 1981, 1982, and 1983 for yearly subsidies of two percent of construction costs, authorized by Act 339, for the following interceptors in the Township:

(a) Pine Run Interceptor

(b) Iron Works Creek Interceptor

(c) The interceptor from the junction of the Pine Run and Iron Works Creek Interceptors to a connection to the Neshaminy Interceptor in Lower Southampton (hereinafter "N-IWPR Interceptor").

5. The total amount of costs of construction for the Pine Run, the Iron Works Creek, and the N-IWPR Interceptors was $915,525.66. If these costs are eligible for inclusion in the basis to calculate NBCMA's Act 339 subsidy, then NBCMA's two percent subsidy for 1981, 1982, and 1983 would be $18,250.47 for each year.

6. By letters dated March 16, 1983, and September 24, 1984, the Department informed NBCMA that it had determined that not all of the interceptor construction costs included in NBCMA's applications were eligible

to be included in the basis for calculating the two percent subsidy, and that only the costs of interceptor construction from the "connection to the Neshaminy Interceptor back [upstream] to the first connection on Langhorne Avenue" could be subsidized.

7. Going upstream from the connection to the Neshaminy Interceptor in Lower Southampton Township, the first connection to any NBCMA interceptor inside Northampton Township is at Langhorne Avenue.

8. The total amount of costs of construction for the N-IWPR Interceptor from the Neshaminy Interceptor tie-in to the first connection at Langhorne Avenue was $23,244.42. The Department used this figure as the basis for calculating NBCMA's Act 339 subsidy, and determined that NBCMA was eligible for a subsidy of $469.89 per year for the years 1981, 1982, and 1983.

9. The Department based its limitation of cost eligibility for NBCMA's subsidy applications entirely on the so-called "first connection limitation" contained in Section 103.25(e)(1) of the Rules and Regulations of the Department, 25 Pa. Code 103.25(e)(1), which became effective on January 23, 1982.

10. NBCMA timely appealed the Department's decisions on its applications for the years 1981, 1982, and 1983 at the above-captioned docket numbers.

11. NBCMA takes the position that it is eligible under Act 339 for a subsidy of $18,250.47 per year for the years 1981, 1982, and 1983.

DISCUSSION

NBCMA has applied for subsidies under Act 339, based upon the cost of constructing three interceptors in the Township. Pursuant to 25 Pa. Code §103.25(e)(1), a regulation promulgated under Act 339, the Department determined that only one portion of one of the three interceptors that NBCMA included in its applications was eligible for inclusion, and that was the portion of the N-IWPR Interceptor from the point where it ties into the Neshaminy Interceptor upstream to the first connection in the Township, which is at Langhorne Avenue. NBCMA argues that the "first connection limitation" in 25 Pa. Code §103.25(e)(1) is inconsistent with the language of Act 339, and arbitrary and capricious, and therefore, asks this Board to rule that the regulation itself is invalid. In the alternative, NBCMA asks the Board to hold that even if the regulation is not invalid per se, it is arbitrary and capricious as applied to the facts of this case. There is no factual dispute in this case, and the only issue before the Board is the validity of 25 Pa. Code §103.25(e)(1), or the so-called first connection limitation.

Act 339 is essentially an act that provides for subsidies for municipalities in the Commonwealth for operational and maintenance costs for sewage treatment facilities. These subsidies are calculated on the basis of the actual costs of construction of the sewage treatment facilities. Section 3 of the Act, 35 P.S. §703 authorizes the EQB[4] to promulgate rules and regulations for the purpose of determining the amount of payments to be made

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[4] Section 3 actually authorized the Department of Health, DER's predecessor in administering Act 339, to promulgate regulations. Section 1901-A(8) of the Administrative Code, 71 P.S. §510-1(8) empowers DER to exercise the powers and perform the duties formerly vested in the Department of Health under Act 339. The EQB, pursuant to §1920-A(c) of the Administrative Code, 71 P.S. §510-20(c), assumed the Department of Health's rulemaking functions under Act 339.

under the Act, and the EQB has promulgated such regulations at 25 Pa. Code, Chapter 103, Subchapter B.[5] This set of regulations includes the first connection limitation, which is at issue in this case.

The regulations of DER are promulgated by the EQB, and although, as a matter of departmental organization, the EQB is an administrative board within DER, when the EQB promulgates regulations, it acts as an independent body separate from DER. 71 P.S. §510-21, United States Steel Corp. v. DER, 65 Pa. Cmwlth. 103, 442 A.2d 7 (1982). This Board has jurisdiction to review any order, permit, license, or decision of DER, but has no jurisdiction to review the promulgation of regulations by the EQB. 71 P.S. §510-21, United States Steel, supra. This Board, however, has an ancillary power to rule on the validity of a regulation within the context of an appeal from a DER action upon the application of the allegedly illegal regulation. Arsenal Coal Company v. DER, 505 Pa. 198, 477 A.2d 1333 (1984). Therefore, within the context of this appeal, the Board can pass on the validity of the first connection limitation, 25 Pa. Code §103.25(e)(1).

As the party asserting the affirmative of the issue in the instant appeals, NBCMA bears the burden of proof under the Board's Rules of Practice and Procedure. 25 Pa. Code §21.101(a). In attacking the validity of a properly promulgated regulation, NBCMA bears an especially heavy burden of proof. See Allegheny County Sanitary Authority v. DER, 1984 EHB 777, 786; Coolspring Township v. DER, 1983 EHB 151.

The regulation at issue here was promulgated pursuant to a direct grant of statutory power. Section 3 of Act 339 provides, "The amounts to be expended for any of the foregoing purposes shall be recommended by the

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[5] The procedures used in promulgating these regulations are not challenged here. The parties stipulated that the regulations were properly promulgated.

Secretary of Health and approved by the Governor, in accordance with rules and regulations which the Department of Health [DER's predecessor] is hereby authorized to promulgate..." This Board has consistently afforded regulations duly promulgated by the EQB a presumption of validity. Coolspring Township v. DER, 1983 EHB 151; Chemclene v. DER, 1982 EHB 485, aff'd _____ Pa. Cmwlth. _____, 497 A.2d 268 (1985). The Pennsylvania Supreme Court has set forth a test for reviewing the validity of administrative regulations that have been adopted pursuant to a grant of legislative power by the legislative body:

> Such a regulation is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.
>
> Pennsylvania Human Relations Commission v. Uniontown Area School District, 455 Pa. 52, 313 A.2d 156, 169 (1973) (quoting K. C. Davis, 1 Administrative Law Treatise §5.03, at 299 (1958)).

Since the parties have stipulated that the regulations were properly promulgated, the Board's scope of review is to determine whether the regulations are within the granted power and whether they are reasonable. Further, because the regulations were promulgated pursuant to a grant of legislative power, they enjoy a presumption of reasonableness. DER v. Locust Point Quarries, Inc., 483 Pa. 350, 396 A.2d 1205 (1979).

Act 339 provides that the subsidies are to be in the amount of two percent of "the costs for the acquisition and construction of such sewage treatment plants" 35 P.S. §701. Construction is then defined as follows:

> Within the meaning of this act, the word "construction" shall include, in addition to the construction of new treatment works, pumping stations and intercepting sewers which are an integral part of the treatment facilities, the altering, improving or adding to of existing treatment works, pumping stations and intercepting sewers which are essential to the

> sewage treatment plant system, provided the acquisition and construction has been directed by the Department of Health, and said construction completed and facilities placed in operation in accordance with the act, approved the twenty-second day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1987).

Therefore, under the language of Act 339, the interceptors that are eligible for inclusion in the basis for calculating a subsidy are those "which are an integral part of the treatment facilities," when "the construction of new treatment works" is involved, and those "which are essential to the sewage treatment plant system," when "the altering, improving or adding to of existing treatment works" is involved. Thus, the legislation qualifies the eligible interceptors with the words "essential" and "integral." Act 339 does not define "essential interceptor" or "integral interceptor," but does grant the EQB the authority to promulgate regulations for the purpose of determining the amount of payments. Therefore, the EQB's promulgation of 25 Pa. Code §103.25(e)(1) was "within the granted power"; Act 339 authorizes the Department to determine the amount of payments under the Act in accordance with DER rules and regulations, and because the Act does not define "intercepting sewers which are an integral part of the treatment facilities," this phrase must be defined to determine the amount of subsidies under Act 339.

Consequently, the only issue which remains is the reasonableness of the regulation that NBCMA is challenging. The regulations define "intercepting sewer" as, "A sewer which receives sewage from various outlets and conducts the sewage to the treatment works. Main, submain, and trunk sewers shall not be included within the definition." 25 Pa. Code §103.21. The regulations set forth which interceptors are "integral portions of the sewage treatment works" at 25 Pa. Code §103.25(e):

> (e) Interceptors which are considered integral portions of the sewage treatment works and therefore

> eligible for payment under the act shall include the following:
>
> (1) That portion of an interceptor between the treatment facility and the first connection.
>
> (2) An interceptor which picks up existing municipally-owned sewers which discharge untreated sewage into the same stream that receives the treatment facility effluent, regardless of the location of the point of discharge of the sewers. The interceptor is eligible from the treatment plant back to the point of interception of the furthest untreated sewage discharge from the plant.
>
> (3) An interceptor which picks up existing municipally-owned sewers which discharge untreated sewage into a tributary stream if that stream contributes at least 15% of the average daily flow to the stream receiving the effluent of the treatment plant, as measured at the point of effluent introduction to this main stream.
>
> (4) An interceptor which carries at least 50% of the total sewage flow from the sewered population of the applicant municipality to the treatment plant or sewer system of another municipality; provided that such interceptor meets the criteria described in paragraphs (1), (2) or (3). Where it is not feasible to obtain sewage flow statistics, demographic statistics may be used.
>
> (f) Pumping stations on or constructed in lieu of interceptors eligible for payment under subsection (e) are also eligible as an integral part of the sewage treatment plant system.

25 Pa. Code §103.25(e)(1) embodies the first connection limitation. Daniel Drawbaugh, the Chief of the Division of Municipal Facilities and Grants in DER's Bureau of Water Quality Management, testified at the hearing that the first connection limitation is an interpretation of "intercepting sewers which are an integral part of the treatment facilities" (Tr. 41). According to Drawbaugh, the rationale behind this interpretation is that the interceptor sewer downstream from the point of first connection is the only part of the interceptor system which is essential for the purpose of getting sewage to the treatment works; if the piece below the point of first connection were not there, none of the sewage could get to the plant, but sewage would get to the plant even if portions of the interceptor above the point of first connection

were destroyed. In other words, the portions of the interceptor above the point of first connection do convey sewage, but none of them, independently, is essential to get the sewage to the treatment facilities. (Tr. 41-42). The Board believes that this interpre- tation of "intercepting sewers which are an integral part of the treatment facilities", though not unflawed, is not sufficiently unreasonable to warrant overturning by this Board. Certainly NBCMA has not met its threshold burden of rebutting the presumption of reasonableness which the disputed regulation enjoys. NBCMA argues that the distinction between interceptors that lie below the point of first connection, and interceptors that lie above the point of first connection, for the purpose of determining which interceptors are integral parts of the treatment facilities, is arbitrary. NBCMA's argument, however, if carried to its logical conclusion, would result in all interceptors being eligible, and this would be contrary to the intent of Act 339.

If the General Assembly intended all interceptors to be eligible it would not have used the qualifying words "essential" and "integral." The Statutory Construction Act, 1 Pa. C.S.A. §§1501, et seq., provides, "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all of its provisions." 1 Pa. C.S.A.§1921(a). It is presumed that every word, sentence or provision of a statute is intended for some purpose and accordingly must be given effect. Com. v. Lobiondo, 501 Pa. 599, 462 A.2d 662 (1983). Therefore, the General Assembly did not intend all interceptors to be eligible in the basis for calculating subsidies under Act 339, but only those that are an "integral part of the treatment facilities," and those that are "essential to the sewage treatment plant system." The General Assembly did not define "integral" and

"essential" in Act 339, but authorized the Department to promulgate regulations.

The establishment of regulations under Act 339 involved the exercise of discretion by the EQB in determining how state money should be distributed among municipalities to defray the costs of operating and maintaining sewage treatment facilities. DER is the agency of the Commonwealth empowered to administer various state laws pertaining to sewage planning and funding, and the Board will not disturb the EQB's determination as to which interceptors are to be regarded by DER as "integral" absent a clear showing that this determination is unreasonable. The Pennsylvania Supreme Court adopted the following language of the United States Supreme Court, which describes the scope of review of an administrative regulation promulgated under a direct grant of statutory power:

> A court, in reviewing such a regulation, "is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action . . . involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appeal to be 'so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.'"
>
> Pennsylvania Human Relations Commission V. Uniontown Area School District 455 Pa. 52, 313 A.2d 156, 169 (1973) (quoting American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 236-237, 57 S. Ct. 170, 172, 81 L.Ed. 142 (1936)).

NBCMA argues that the first connection limitation is an arbitrary distinction because all interceptors are integral to the system. In a sense this is

true, but Act 339 calls for a distinction between which interceptors are integral and which are not, and leaves it to the EQB to flesh out the distinction. The interceptors downstream from the point of first connection are more integral to the system in a technical sense, and the Board believes that the first connection interim is not an irrational basis for distinguishing which interceptors are integral for purposes of Act 339. Even if NBCMA were able to present the Board with an alternative way of distinguishing integral interceptors from nonintegral interceptors that does not violate the language of Act 339, this would not be a sufficient basis for this Board to declare this reasonable distinction invalid. Since the Legislature chose not to define "integral interceptors," the EQB was compelled to do so in order to determine the amount of payments to be made under Act 339. In doing so, the EQB exercised sound judgment, and this Board will not declare 25 Pa. Code §103.25(e)(1) invalid per se, or in its application to this case.

NBCMA argues that this Board's decisions in two appeals by the Allegheny County Sanitary Authority, Allegheny Sanitary Authority v. DER, 1982 EHB 29 (hereinafter "Alcosan I), and Allegheny Sanitary Authority v. DER, 1984 EHB 777 (hereinafter "Alcosan II"), are dispositive of the instant appeals. We disagree. The Alcosan decisions addressed the criteria uses in determining the amount of subsidies under Act 339, but they did not address the first connection limitation. In Alcosan I, the criteria for determining the amount of subsidies under Act 339 had not been promulgated as regulations, and at that time DER argued that no interceptors were integral to the sewage treatment plant:

> DER argues that no interceptor can be integral to a sewage treatment plant and thus DER argues that it has expanded the statutory wording by providing eligibility for any interceptors. We disagree. Act 339 specifically includes in the

> definition of "construction", intercepting sewers which are "an integral part of the treatment facilities". DER's interpretation would render this wording ineffective and thus is an improper statutory construction. 1 Pa. C.S. §1921(a); Comm. v. Driscoll, 485 Pa. 99, 401 A.2d 312 (1979).
>
> Alcosan I, 1982 EHB at 45 (emphasis in original).

In the instant appeals DER argues that only "integral" interceptors, which are enumerated in 25 Pa. Code §103.25(e), are eligible, and this interpretation is consistent with the language of Act 339. In Alcosan I, moreover, the issue was whether Alcosan's interceptors could be considered "integral" under a policy which now has been promulgated as §103.25(e)(4) quoted supra; the reasonableness of §103.25(e)(1) simply was not addressed in Alcosan I.

In Alcosan II, the Board considered the eligibility of the same interceptors that the Board held were eligible in Alcosan I, but Alcosan II concerned payments for subsequent years. When the Board considered the Alcosan II appeal, the regulations at 25 Pa. Code Chapter 103, Subchapter B were in place. DER therefore argued that Alcosan I, which was issued before the regulations had been promulgated, could not be dispositive of the Alcosan II eligibility dispute. The Alcosan II opinion held, however, that Alcosan I was dispositive, because

> it is apparent from the language of Alcosan I that the Board would have found the disputed facilities eligible for Act 339 subsidies even if the Board had regarded DER's unpublished eligibility criteria as regulations rather than as mere expressions of DER policy.
>
> Alcosan II, 1984 EHB at 784.

Alcosan II did not rule de novo on the reasonableness of the DER policy now embodied in 25 Pa. Code §103.25(e), and did not even mention the first connection rule which is the subject of the instant appeal. Moreover,

Alcosan II explicitly refused to hold that the regulations in 25 Pa. Code §103.25 are invalid:

> However, we disagree that our present upholding of the disputed facilities Act 339 eligibility amounts to a ruling that 25 Pa. Code §103.25 is an invalid regulation. Our ruling that the disputed facilities have Act 339 eligibility is equivalent to the assertion that, under the particular facts of Alcosan's sewage system, denial of Act 339 eligibility to the disputed facilities on the basis of 25 Pa. Code §103.25 would be an abuse of DER's discretion.
>
> Alcosan II, 1984 EHB at 787.

Therefore, the Alcosan decisions are not dispositive of the instant appeals.

In final conclusion, although we recognize that many of NBCMA's arguments have considerable merit, we cannot find these arguments persuasive enough to overturn a regulation [§103.25(e)(1)] which the EQB presumably carefully considered before promulgation. If DER's practices are to be modified to permit state subsidies for all or most of NBCMA's interceptors identified in Finding of Fact 4, that modification must stem from an action of the EQB or the legislature, not from an adjudicative fiat of this Board.

CONCLUSIONS OF LAW

1. NBCMA bears the burden of proof in these appeals. 25 Pa. Code §21.101(a).

2. The regulation at issue in these appeals, 25 Pa. Code §103.25(e)(1), was promulgated under a direct statutory grant of power. 35 P.S. §703.

3. Section 103.25(e)(1) was properly promulgated pursuant to Section 905 of the Commonwealth Documents Law. 45 Pa. C.S.A. §905.

4. As a properly promulgated regulation, it is presumed by the law that Section 103.25(e) meets the objectives of Act 339, the statute under which it was promulgated.

5. The interpretation of §103.25(e) that NBCMA proposes cannot be adopted by the Board, since to require the Department to find all interceptors to be eligible in the subsidy base would read certain words out of Act 339 in violation of principles of statutory construction. 1 Pa. C.S.A. §1921(a).

6. Act 339 allows "intercepting sewers which are an integral part of the treatment facilities" to be included in the subsidy base, but does not define this phrase. Therefore, the EQB is compelled to define this phrase in order to determine the amount of subsidies under the Act. 35 P.S. §702.

7. The DER regulation containing the "first connection limitation," 25 Pa. Code §103.25(e)(1), is a reasonable definition of the words "intercepting sewers which are an integral part of the treatment facilities," as contained in Act 339, Section 2, 35 P.S. §702.

8. The Board's decisions in Alcosan I and II are not specifically applicable in this case since in those cases the "first connection limitation" of §103.25(e)(1) was not at issue and the Board did not rule on its reasonableness. Allegheny County Sanitary Authority v. DER, 1982 EHB 29 ("Alcosan I"); Allegheny County Sanitary Authority v. DER, 1984 EHB 777 ("Alcosan II").

9. The Alcosan I and II decisions do not govern this case for the further reason that Alcosan II specified that both decisions were limited to determinations that use of §103.25 to limit Alcosan's Act 339 eligibility would be an abuse of DER's discretion "under the particular facts of Alcosan's sewage system."

10. NBCMA did not sustain its burden of proof and overcome the presumption that 25 Pa. Code §103.25(e)(1) is valid.

ORDER

AND NOW, this 6th day of June, 1986, the appeals of Northampton, Bucks County Municipal Authority at EHB Docket Nos. 83-062-M and 84-362-M are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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For the Appellant:
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DATED: June 6, 1986

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LANSDALE BOROUGH	:	
	:	
V.	:	**DOCKET NO. 83-088-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 9, 1986

OPINION AND ORDER

Synopsis

This is an appeal from a refusal by the Department of Environmental Resources ("DER") to approve 30 change orders submitted by Appellant in connection with the construction of a wastewater treatment plant under a grant from the United States Environmental Protection Agency ("EPA") pursuant to §201 of the Clean Water Act, 33 U.S.C. §1281. DER's Motion to Dismiss for untimeliness is granted as to ten of the change orders because Appellant had sufficient notice that a final decision had been made with regard to these change orders more than thirty days prior to its filing this appeal with the Board. 25 Pa. Code §21.52(a). DER's Motion to Dismiss is denied as to the other 20 change order determinations. DER concedes that five of these determinations were timely appealed. The letters that DER argues embody final determinations on the other fifteen change orders did not adequately notify appellant that final determinations had been made. Appellant did not receive adequate notice of a final determination with regard to these fifteen change orders until it received the letters that it timely appealed.

Former federal regulation 40 C.F.R. §30.900-2 applies to this case because it was in effect at the time the grant agreement was executed. This rule requires the "grants officer" to notify grantees of disapproval of a change order within three weeks of receipt of the change order. The Board adopts an EPA Board of Assistance Appeals holding that this rule results in change orders being deemed approved if notice of disapproval is not given in three weeks. This rule applied to DER after the EPA delegated to DER the authority to administer the construction grants program. DER stipulated in this case that it did not act on the change orders within three weeks of receipt, therefore, by automatic operation of 40 C.F.R. §30.900-2, the change orders were deemed approved. Since the change orders were approved by automatic operation of law, Appellant is entitled to judgment as a matter of law with regard to the change order disapprovals that it timely appealed. Thus, these appeals are sustained with regard to the 20 timely appealed change orders.

OPINION

The above-captioned matter comprises four consolidated appeals filed by Lansdale Borough from determinations that the Department of Environmental Resources ("DER") made in conjunction with the construction by the Borough of Lansdale of a wastewater treatment plant under a grant from the United States Environmental Protection Agency (EPA), pursuant to §201 of the Clean Water Act, 33 U.S.C. §1281. These appeals concern change orders for the construction contracts, which DER determined were not eligible for cost participation in the federal grant. The consolidated appeals involve 31

change orders.[1] On November 17, 1983, DER filed a Motion to Dismiss, in which DER argued that it had made final determinations regarding the eligibility of 25 of the 31 change orders more than thirty days before Lansdale filed these appeals.[2] Thus, DER argues that of the 31 change order determinations involved in this case, only five were timely appealed.

In response to DER's Motion to Dismiss, Lansdale has made several arguments. First, Lansdale argues that DER's supposed determination letters were not final adjudications within the meaning of the law, and therefore, they were not appealable. Second, Lansdale argues that all of the change orders in question were deemed approved by virtue of the failure of DER and EPA to give notice of disapproval pursuant to the "three weeks rule" set forth in 40 C.F.R., §30.900-2. Finally, Lansdale argues, in the alternative, that it is entitled to an appeal nunc pro tunc of the letters in question.

The Board held a hearing on November 8, 1985, solely on the issue of the timeliness of the appeals of the 25 change order determinations that DER alleges were not timely appealed. The parties filed briefs on this question following the hearing, and this opinion will dispose of DER's Motion to Dismiss, and Lansdale's arguments in response to DER's motion. Before

---

[1] One of the change order determinations that Lansdale appealed, Change Order No. 6 for Contract No. 9, was reviewed by the EPA prior to the delegation agreement entered into by the EPA and DER on July 29, 1979, in which the EPA delegated to DER various functions and responsibilities in administering the construction grants program. Since the decision on the eligibility for grant participation of this change order was made by the EPA, rather than by DER, this Board has no authority to review it. Therefore, the Board is reviewing 30 of the 31 appealed change order determinations.

[2] §21.52(a) of the Board's Rules and Regulations, 25 Pa. Code §21.25(a), provides that jurisdiction of the Board shall not attach to an appeal from an action of DER unless the appeal is filed within 30 days after the party appellant has received notice of such action.

addressing the question of timeliness, however, the Board will first address the issue of whether 40 C.F.R. §30.900-2,[3] the so-called three weeks rule, applies to this case.

Federal construction grants are contracts between the grantee and the EPA. 33 U.S.C. §1283. As such, the regulations in effect at the time the construction grant was awarded govern the grant. See Borough of Lewistown v. DER (Opinion and Order, December 5, 1985). The EPA awarded Lansdale the construction grant on December 28, 1976, and Lansdale signed the grant agreement in January, 1977. At that time, 40 C.F.R. §30.900-2 was in effect:

> §30.900-2 Disapproval of project changes.
> The Grants Officer may disapprove project changes in writing by certified mail (return receipt requested) not later than 3 weeks after receipt of

[3] This regulation was published on November 27, 1971, with an effective date of January 1, 1972. 35 Fed. Reg. 22716. This regulation was deleted in its entirety on September 30, 1983. 48 Fed. Reg. 45056.

> notice pursuant to §30.900-1.[4] Failure on the part of the grantee to give notice pursuant to §30.900-1 or disapproval by the Grants Officer of the proposed change shall result in disallowance of costs incurred which are attributable to the change or in termination of the grant. No action taken pursuant to this section shall commit or obligate the United States to any increase in the amount of a grant or payments thereunder, but shall not preclude consideration of a request for a grant amendment pursuant to §30.901.

A change order is a written order by the grantee to the construction contractor authorizing an addition, deletion, or revision in the work or the time of completion, within the limits of the construction contract, after it has been executed. It is a specific type of contract modification that does not go beyond the general scope of the grant agreement. When a grantee executes a change order, it submits the change order to DER, and DER then reviews the change order for technical acceptability and for eligibility for cost participation in the federal grant.

---

[4] 40 C.F.R. §30.900-1 provided as follows:

§30.900-1 Notice of project changes.

The grantee shall promptly notify the Grants Officer in writing by certified mail (return receipt requested) of all project changes, including but not limited to:

(a) Rebudgeting (see §30.601);

(b) Changes in the technical plans or specifications for the project;

(c) Acceleration or deceleration in the time for performance of the project, or any major phase thereof;

(d) Changes which may increase or decrease the total cost of a project;

(e) Changes which may affect the approved scope of a project;

(f) Changed site conditions;

(g) Changes in personnel identified as key personnel in the grant agreement;

(h) Absence of personnel identified as key personnel in the grant agreement from the project at critical project points or for periods of time longer than 3 months;

(i) Substantial reduction of effort on the project by personnel identified as key personnel in the grant agreement; or

(j) Changes or amendments to nonFederal enabling legislation, regulations, standards, ordinances, or enforcement procedures which may affect the project.

Since 40 C.F.R. §30.900-2 was in effect at the time Lansdale entered into its grant agreement, 40 C.F.R. §30.900-2 applies to the grant agreement. An EPA Board of Assistance Appeals decision has interpreted this regulation as a requirement that the EPA approve change orders if it does not provide notice of disapproval within three weeks of receipt of the change order. Bolinas Community Public Utility District, Board of Assistance Appeals. Docket No. 79-43. Pursuant to the delegation agreement, DER is required to apply all applicable federal regulations. Therefore, if 40 C.F.R. §30.900-2 required the EPA to provide written notice, within three weeks, of disapproval of change orders, then, it would require the same thing of DER when DER assumed the responsibility for reviewing change orders. The Board believes that the EPA Board of Assistance Appeals interpretation of 40 C.F.R. §30.900-2 in Bolinas as requiring the EPA to approve change orders if it does not provide notice of disapproval within three weeks of receipt of the change order is reasonable, and adopts this interpretation.

Although counsel for DER stipulated at the hearing that DER did not respond to the change orders within three weeks of receipt, James Newbold, of DER's Bureau of Water Quality Management, who was the project manager who reviewed all of the change orders in question, testified that he was not even aware of the three weeks rule until sometime during the course of this litigation (N.T. 6, 27). Nevertheless, this rule did exist between 1972 and 1983, and therefore applies to this case. Thus, since DER has stipulated that it did not respond to the change orders within three weeks, they are deemed approved by operation of 40 C.F.R. §30.900-2.

Although the change orders were approved by operation of 40 C.F.R. §30.900-2, DER did not follow this regulation in its review of change orders,

and eventually informed Lansdale that the change orders were disapproved for cost participation. Thus, at various points, DER disapproved the change orders in violation of 40 C.F.R. §30.900-2, and these actions would constitute actions of DER that are appealable to this Board. When DER makes a decision that affects a party's rights, and that party believes that the decision violates a law or a regulation, that party's remedy is with this Board. Furthermore, unless Lansdale filed an appeal with this Board within thirty days after it had notice that DER disapproved its change orders in violation of 40 C.F.R. §30.900-2, this Board simply has no jurisdiction to review DER's disapproval of the change orders. The Board's thirty day requirement for the filing of appeals, 25 Pa. Code §21.52(a), is mandatory. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). The Board simply has no jurisdiction to review untimely appeals, regardless of how contrary to law or manifestly unreasonable the appealed action of DER may have been. Therefore, the Board must look at all the circumstances in this case, and determine at what point, if at all, DER notified Lansdale that it disapproved each of the change orders in question.

The five change order determinations that DER concedes were timely appealed are ones that Lansdale appealed on May 5, 1983, and these were appeals originally docketed at 83-089-M and 83-090-M. These timely appealed change order determinations are for Contract No. 5, Change Order No. 5; Contract No. 6, Change Order No. 1; Contract No. 7, Change Order No. 1; Contract No. 8, Change Order No. 2; Contract No. 1, Change Order No. 19. Although the Board is ruling on a motion to dismiss for untimeliness, filed by the Department, Lansdale raised the issue in its response to the Department's motion to dismiss that the change orders were approved by

operation of the three weeks rule. Since Lansdale is appealing the Department's disapproval of its change orders, its argument that they were approved by automatic operation of law amounts to an argument that its appeal of the Department's disapproval of its change orders should be sustained as a matter of law. This is, in effect, an argument by Lansdale that it is entitled to summary judgment. The Board agrees with Lansdale that its change orders were approved by automatic operation of the three weeks rule; therefore, if Lansdale's consolidated appeals of the Department's disapproval of these change orders are timely, then Lansdale is entitled to judgment as a matter of law. This Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978). Since Lansdale's appeals originally docketed at 83-089-M and 83-090-M were timely, Lansdale is entitled to judgment as a matter of law, and the Board, therefore, sustains Lansdale's appeal with regard to the change order disapprovals originally appealed at 83-089-M and 83-090-M.

The change order determinations that DER alleges were not timely appealed are the subjects of the appeals originally docketed at 83-088-M and 83-107-M, which Lansdale filed on May 5, 1983, and May 31, 1983 respectively. The appeal that was originally docketed at 83-088-M was from the following letter, dated April 5, 1983, from DER to Lee Mangan, Lansdale's Borough Manager:

> We have reviewed your consultant's letter of September 3, 1982 providing additional justification for the referenced change orders. After considering the submitted information we have determined that our ineligible decision made on May 13, 1982 remains.

> If you have any questions, please contact me at the above number.

This letter pertained to Contract No. 1, Change Order No. 12 and Contract No. 4, Change Order No. 17.

The appeal that was originally docketed at 83-107-M was from a letter, dated May 2, 1983, from DER to Lee Mangan, which said, "In response to your April 5, 1983 request, we have prepared the following summarization of our eligibility determinations for all 64 contract orders related to your project," and the letter then listed all the change orders, the amounts approved for grant participation, the amounts denied for grant participation, and the determination dates. After the list of change orders, the letter said the following:

> Please note that the determination dates given are the dates of the letters transmitting our final eligibility decision. If any discrepancies exist between the above listing and the actual determination letters, the determination letters will govern.
>
> I hope this letter satisfies your request; however, if you have any other questions, please feel free to contact me.

The May 2, 1983 letter refers to some change order determinations that Lansdale had already appealed, and it also refers to the following additional change orders:

Contract No. 1	Change Order No.	8
		9
		11
		13
		15
		16
		20
Contract No. 2	Change Order No.	1
		2
Contract No. 3	Change Order No.	1
Contract No. 4	Change Order No.	8

9
11
12
14
16
19
20
22
23
24
25

Contract No. 5 Change Order No. 4

Therefore, the April 5, 1983 letter, which Lansdale originally appealed at 83-088-M, and the May 2, 1983 letter, which Lansdale originally appealed at 83-107-M, both refer to earlier DER letters that DER alleges embodied final decisions that the April 5, 1983 letter and the May 2, 1983 letter either reiterated or summarized. Thus, the Board must review each of the letters that DER alleges embody a final determination, and determine whether Lansdale should have recognized these letters as a final denial of their request for EPA cost participation. See Borough of Lewistown v. DER (Opinion and Order, December 5, 1985); Spring-Benner Joint Authority v. DER, 1983 EHB 264.

The earliest letter was dated September 2, 1980, and read as follows:

> Dear Mr. Mangan:
>
> Enclosed are copies of the below listed change orders which are approved for content only, and not for EPA cost participation:
>
> | Contract No. | Change Order No. | Explanation |
> |---|---|---|
> | 5 | 4 | Costs (including those resulting from construction delays), which are connected with site acquisition, are ineligible. |
>
> These change orders have been stamped Approved as required by our Rules and Regulations

This letter is almost identical to the letter appealed in Spring-Benner Joint Authority v. DER, 1983 EHB 264, and the Board held that that letter did not provide adequate notice of a final determination:

> By contrast the January 9, 1981 letter is so succinct as to asymptotically approach the vanishing point. Perhaps, as DER argues, the authority's consultants, who worked with DER on a daily basis, knew that this letter constituted a final denial of EPA cost participation, but we hold DER to a higher standard when it seeks to deprive an appellant of his day in court. The question, we believe, is whether the lay persons on the authority, to whom the January 9, 1981 letter is addressed, would recognize it as a final denial of their request for EPA cost participation. Since neither the word "denial" nor any synonym thereof is used in this letter we cannot hold this letter to constitute the type of written notice required to start the operation of §21.52.
>
> Spring-Benner, 1983 EHB at 266.

Therefore, on the basis of the reasoning set forth in Spring-Benner, we hold that the September 2, 1980 letter did not constitute the type of written notice required to start the operation of 25 Pa. Code §21.52. There is no other correspondence in the record regarding this change order except the May 2, 1983 letter that Lansdale appealed on May 31, 1983. Therefore, Lansdale's appeal of DER's disapproval for cost participation of Contract No. 5, Change Order No. 4 was timely. Since Lansdale timely appealed DER's disapproval of this change order, and since this change order is deemed approved by automatic operation of 40 C.F.R. §30.900-2, Lansdale is entitled to judgment as a matter of law with regard to this change order, and therefore, Lansdale's appeal of this change order is sustained.

The next letter was dated May 12, 1982, and read as follows:

Dear Mr. Mangan:

Enclosed is one copy of each of the following change orders:

Contract No.	Change Order No.	Explanation
4	7	$8,093.11 cost is eligible.
4	9	75 days time extension is approved. 90 days time extension is not allowable. Related to Contract No. 1 which was held to 75 days approved time extension.
4	15	$4,963.18 costs and time extension of 15 days are eligible.

Specified portions of Contract No. 4, Change Order Nos. 7, 9 and 15 listed above are eligible for EPA participation up to the currently remaining contingency amount. Should any subsequent additional submitted change orders result in the contingency amount being exceeded, we will consider a grant increase after final Federal audit of your project and all eligible costs have been determined.

The specified portion of the time extension in Contract No. 4, Change Order No. 9 is approved for content only and not for EPA cost participation.

The above-listed change orders have been stamped with State Approval as required by our Rules and Regulations.

DER sent another letter to Lansdale on May 13, 1982, which read as follows:

Dear Mr. Mangan:

Enclosed is one copy each of the following change orders:

Contract No.	Change Order No.	Amount
1	9	75 days time extension approved. 175 days not allowable.
1	12	$1,500.00 Item 2 is eligible. $86,000.00 Item 1 and 120 day time extension ineligible. Not essential for proper plant operation, provided for operation and maintenance ease.
1	13	$69,000.00 ineligible increase in scope.
1	14	Credit ($20,000.00) is eligible.
1	15	$9,898.00 ineligible aesthetic change in scope.
1	16	$21,965.00 costs and 30 day time extension are ineligible. This work is related to ineligible change orders Nos. 12 and 13 and beyond approved project scope.
1	17	$16,672.00 costs and the 14 day time extension are eligible.
1	18	$2,740.12 is eligible.
2	1	$1,995.97 is eligible. $2,529.84 is ineligible rework.
2	2	75 days time extension is approved. 212 days are not allowable.
3	1	75 days time extension is approved. 212 days are not allowable.

Specified portions of the costs and/or specified time

> extensions for Contract No. 1, Change Order Nos. 9, 12, 14, 17 and 18, Contract No. 2, Change Order Nos. 1 and 2, and Contract No. 3, Change Order No. 1 are eligible for EPA participation up to the currently remaining contingency amount. Should any subsequent additional submitted change orders result in the contingency amount being exceeded, we will consider a grant increase after final Federal audit of your project and all eligible costs have been determined.
>
> Specified portions of the costs and/or specified time extensions for Contract No. 1, Change Order Nos. 9, 12, 13, 15, and 16, Contract No. 2, Change Order Nos. 1 and 2 and Contract No. 3, Change Order No. 1 are approved for content only and not for EPA cost participation.
>
> The unapproved time extensions involve no federal participation for monetary increases for related inspection or other services.
>
> Please note that Change Order No. 14, Contract No. 1, is a decrease.
>
> The above listed change orders have been stamped with State Approval as required by our Rules and Regulations.

Although these two letters do not say much more than the September 2, 1980 letter said, the evidence of record demonstrates that Lansdale's engineers recognized them as final determinations. On May 21, 1982, a member of Lansdale's consulting engineering firm wrote a letter to DER saying that they had received the letters of May 12 and May 13, 1982, and they were "formally appealing" the rulings for all change order work ruled as ineligible. This letter precipitated another letter, dated June 3, 1982, from DER to Lee Mangan, Lansdale's Borough Manager, which said, "We are in receipt of your consultant's May 21, 1982 letter appealing the change order eligibility determination contained in our May 12, 1982 and May 13, 1982 letters." The letter then gave an "expanded justification" for the ineligible determinations. This letter also included the following paragraph:

> As outlined above, we feel justified in our eligibility determinations; therefore our final decision is that the above change orders remain ineligible. If you as the authorized representative intend to continue the appeal, you may write to the Environmental Protection Agency's Regional Administrator, or to the Environmental Hearing Board, 221 North Second Street, Third Floor, Harrisburg, Pennsylvania 17120, 717 787-3483. Copies of the appeal form and the regulations governing practice and procedure before the board may be obtained from the board.

Therefore, even if the May 12 and May 13, 1982 letters did not provide adequate notice of final determinations, the June 3, 1982 letter did. At the hearing, Thomas Johns, director of construction services for Lansdale's consulting engineer firm, and the author of the May 21, 1982 letter, testified that DER's James Newbold told him that DER would review or reconsider any previous rulings on the change orders, and had Newbold not said this, he would have advised Lansdale that they had no further recourse with DER and they should seek the appeal procedure (N.T. 70-71). DER, however, did not actively mislead appellant about the appeal procedures. In fact, DER specifically informed appellant of the appeal procedures in the June 3, 1982 letter. DER always has the discretion to reconsider its decisions, but DER is under no obligation to change a decision. If a party wants this Board to review a decision of DER, the party must file an appeal within thirty days of notice of the decision. If the party asks DER to reconsider the decision, and DER reconsiders, but does not change the decision, this refusal to change the decision is not appealable to this Board. See DER v. New Enterprise Stone & Lime Co., Inc., 25 Pa. Cmwlth. 389, 359 A. 2d 845 (1976); Borough of Lewistown v. DER, (Opinion and Order, December 5, 1985). Therefore, Lansdale had sufficient notice of a final determination of ineligibility for the following change orders as of June 3, 1982:

Contract No. 1, Change Order No.	12
	9
	13
	15
	16
	20
Contract No. 2, Change Order No.	1
	2
Contract No. 3, Change Order No.	1
Contract No. 4, Change Order No.	9

Since Lansdale did not appeal these determinations until May of 1983, its appeals of these determinations are untimely. Therefore, DER's Motion to Dismiss with regard to these change orders is granted.

The next two letters that DER alleges embody final determinations are dated May 19, 1982, and September 1, 1982. These letters are in the same format as the May 12 and May 13, 1982 letters, and therefore, we will not quote them here. Lansdale's engineers, however, did not request additional information about these letters, and no letter with an "expanded justification," or an explanation of appeals procedures was ever sent to the Lansdale Borough Manager, as had been done with regard to DER's May 12 and May 13, 1982 letters. Therefore, based on the reasoning set forth in Spring-Benner, we hold that neither DER's May 19, 1982 letter, nor DER's September 1, 1982 letter, gave Lansdale sufficient notice that a final decision had been made with regard to the following change orders:

Contract No. 1, Change Order No.	8
Contract No. 4, Change Order No.	8
	11
	12
	14
	17
	19
	20
	22
	23
	25

Therefore, Lansdale's appeal of DER's disapproval of these change orders was timely. Since Lansdale timely appealed these change orders, and since these change orders were deemed approved by automatic operation of 40 C.F.R. §30.900-2, Lansdale is entitled to judgment as a matter of law with regard to these change orders. Therefore Lansdale's appeal is sustained with regard to these change orders.

The final letter that DER alleges embodies a final determination is dated December 13, 1982, and reads as follows:

> Dear Mr. Mangan:
>
> We have completed our review of the following change orders:
>
> | Contract No. | Change Order No. |
> |---|---|
> | 1 | 7 |
> | 1 | 11 |
> | 1 | 20 |
> | 4 | 10 |
> | 4 | 16 |
> | 4 | 18 |
> | 4 | 24 |
>
> A copy of each change order is enclosed. Our determination is noted on the attachment to each change order. This determination is applicable up to the currently remaining grant contingency amount.
>
> Please take note that certain specified monetary portions and time extension periods are approved for content only and not for EPA cost participation.

The attachment to each change order was in this format:

> EPA Project # C-421032-01 Contract No. 1 Change Order No. 11
> Amt. For Grant Participation $91,800,00 Comments: Cost Approved
> Amt. Not For Grant Participation $ 4,000.00 Comments: See Below
> Time Extension: No. days approved 30 days Comments: _____
>
> Additional Comments: Item No. 6 involving an office partition for building B-1 is considered not essential for proper plant operation and is ineligible for Federal grant participation.

This format did not provide any more information than did the letters that we have held did not provide adequate notice of a final decision. Thus, once again, we hold that, based on the reasoning of Spring-Benner, this letter did not provide Lansdale with sufficient notice that any final decision was made. Therefore, Lansdale's appeal of DER's disapproval of these change orders was timely. Since Lansdale timely appealed these change orders, and since these change orders were deemed approved by automatic operation of 40 C.F.R. §30.900-2, Lansdale is entitled to judgment as a matter of law with regard to these change orders. Therefore, Lansdale's appeal is sustained with regard to the following change orders:

Contract No. 1, Change Order No. 11
Contract No. 4, Change Order No. 16
24

The change orders as to which Lansdale's appeals are sustained are deemed approved by virtue of 40 C.F.R. §30.900-2. The significance of an approval by DER of a change order is somewhat obtuse. DER argues that even if the change orders are deemed approved, DER still does not have to approve them for cost participation. DER bases this argument on the following portion of 40 C.F.R. §30.900-2:

> No action taken pursuant to this section shall commit or obligate the United States to any increase in the amount of a grant or any payments thereunder, but shall not preclude consideration of a request for a grant amendment pursuant to §30.901.

The Board believes, however, that DER's interpretation of this provision is illogical when compared with the overall scheme of change orders and grant amendments. At the time the grantee enters into the grant agreement, the amount of the grant is set. A change order is a change in a construction contract, which does not go beyond the general scope of the grant agreement,

including the total dollar amount. Therefore, even when a change order is approved for cost participation, the EPA is not obligated to increase the total amount of the grant award, which was determined pursuant to the grant agreement. To increase the dollar amount of the grant award, the grantee must have a grant amendment approved. Therefore, the Board interprets the language in 40 C.F.R. §30.900-2 that provides that an approval of a change order does not obligate the United States to an increase in the amount of a grant or payments thereunder, as meaning that an approval of a change order for cost participation does not obligate the United States to increase the total amount of the grant award, which is set forth in the grant agreement. Nevertheless, an "approved" change order is approved for cost participation, and the EPA is obligated to reimburse the grantee for the change orders, up to the amount of the grant award. Some of the confusion in this area may derive from the changes in DER's authority to review change orders that resulted from the delegation agreement. Prior to the delegation agreement, grantees submitted change orders to DER, and DER reviewed the change orders for technical acceptability. If DER "approved" the change order that meant that it was technically acceptable, but it did not mean that it was eligible for grant participation. DER would certify the change order to the EPA as technically acceptable, and the EPA would review for eligibility for cost participation. Under the delegation agreement, however, the EPA delegated to DER the authority to review change orders for both technical acceptability and eligibility for cost participation. Therefore, subsequent to the delegation agreement, when DER "approves" a change order, it certifies to the EPA that the change order is both technically acceptable, and eligible for cost participation. Therefore, Lansdale's change orders that have been

approved by operation of 40 C.F.R. §30.900-2 are both technically acceptable, and eligible for grant participation, but the EPA is not obligated to reimburse Lansdale beyond the total dollar amount of the grant set forth in the grant agreement.

ORDER

AND NOW, this 9th day of June , 1986, the consolidated appeals of the Borough of Lansdale at EHB Docket No. 83-088-W are sustained as to the following change orders executed under Construction Grant C-421032-01:

Contract No.	Change Order No.
1	8
1	11
1	19
4	8
4	11
4	12
4	14
4	16
4	17
4	19
4	20
4	22
4	23
4	24
4	25
5	4
5	5
6	1
7	1
8	2

The Department of Environmental Resources is hereby ordered to certify these change orders to the United States Environmental Protection Agency as technically acceptable and eligible for cost participation.

The consolidated appeals of the Borough of Lansdale are dismissed for untimeliness as to the following change orders executed under Construction Grants C-421032-01:

Contract No.	Change Order No.
1	9
1	12
1	13
1	15
1	16
1	20
2	1
2	2
3	1
4	9

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
John Wilmer, Esq.

For the Appellant:
John F. Dooley, Esq.
Lansdale, PA

DATED: June 9, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

CONSOLIDATION COAL COMPANY :

:

: Docket No. 85-220-G

: Issued June 11, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GEORGE ENTERPRISES, INC. and
INTERSTATE DRILLING, INC.

OPINION AND ORDER

Synopsis

DER's Motion for Summary Judgment is granted. The portions of this appeal which concern wells 1 and 2 are dismissed; the portion of the appeal which concerns well 4 remains before the Board.

In the absence of facts indicating that a permittee under the Oil and Gas Act, 58 P.S. §601.101 et seq., is in violation of statutes or regulations or is engaging in activity harmful to the public, DER lacks authority to take action against the permittee regardless of whether the permittee's permits have or have not expired by operation of law. As of the date of the DER action appealed herein, a letter dated May 2, 1985, DER was not in possession of such facts. Therefore, DER properly exercised its discretion with respect to wells 1 and 2 by refusing to take action against the permittee.

The fact that the Board's review of DER actions is de novo does not affect this holding; even if the Board were to assume arguendo that the permits for wells 1 and 2 had expired by operation of law on April 18, 1985 (the effective date of the Oil and Gas Act), drilling activities which occurred after the date of the DER

action at issue (May 2, 1985) cannot be considered in the Board's determination of whether that action was a proper exercise of DER's discretion. The issue of whether DER should have taken another action subsequent to the action appealed herein is not before the Board.

OPINION

In previous Opinions and Orders at the above-captioned Docket member the Board has denied DER's motion to dismiss this appeal as taken from an unappealable action (Opinion and Order issued September 18, 1985) and has denied DER's motion to dismiss this appeal as moot (Opinion and Order issued December 20, 1985). DER now has moved for judgment on the pleadings, on the grounds that Consol's requested action which DER refused to take was beyond DER's authority as a mattter of law. We herewith rule on this DER motion, which the parties were advised (in a letter from the Board dated February 4, 1986) would be treated as a motion for summary judgment. Because much of the history of this appeal has been thoroughly described in our Opinions of September 18 and December 20, 1985, in the instant Opinion we shall summarize the appeal's history only insofar as is clearly necessary for the Opinion to be comprehensible; readers are advised to review those earlier Opinions.

Consol has appealed DER's refusal (in a letter to Consol dated May 2, 1985) "to take whatever action is necessary to prevent the unauthorized drilling" of three gas wells which have been identified as George wells 1, 2 and 4. According to Consol, George's permits for these three wells had expired. DER originally believed that all three permits were valid, but later (on June 21, 1985) did inform George that (now according to DER) the permits for wells 1 and 2, but not for well 4, indeed had expired. DER's motion for summary judgment argues, however, that whether or not the permits had expired DER had no authority to take the action against

George which Consol had requested. According to DER the action required, e.g., an order to George to cease drilling activities or to surrender its permits, must be based on findings that George was in violation of statutory or regulatory provisions justifying such action; DER asserts that prior to writing Consol on May 2, 1985, DER had no indication of any such violations by George, and that no such violations prior to May 2, 1985 have been alleged by Consol or established in the record of this appeal to date. For reasons which escape us, DER's motion is addressed solely to wells 1 and 2, although DER's arguments -- if upheld by the Board -- seemingly would justify summary judgment in favor of DER on well 4 no less than on wells 1 and 2. Nevertheless, since DER's motion pertains to wells 1 and 2 only, we here rule only on the propriety of DER's refusal to take action on wells 1 and 2.

In discussing DER's motion it is convenient to examine first the propriety of DER's refusal to take action on the facts available to DER on May 2, 1985. A motion for summary judgment may be based on answers to interrogatories. Pa.R.C.P. Rule 1035(a). Consol's brief, referring to George's answers to Consol's interrogatories, asserts that George engaged in well-drilling activities at the sites for wells 1 and 2 during June 1985; the interrogatories do not state, and Consol has pointed to nothing in the record which does state, that George engaged in well-drilling activities at the wells 1 or 2 sites before May 2, 1985 and after April 18, 1985; Consol's brief admits that no drilling took place at wells 1 and 2 prior to mid-June 1985. All parties agree that George's permits did not expire before April 18, 1985. Therefore, even if George's permits for wells 1 and 2 did expire by operation of law on April 18, 1985 (as Consol and DER now believe), before June 1985 George unquestionably did not violate the Oil and Gas Act, 58 P.S. §601.509(2), by conducting drilling activities on wells 1 or 2 without a

permit. Consol has not alleged that at any time prior to May 2, 1985 George violated any other provisions of the Oil and Gas Act or of other applicable statutes or regulations. Thus we must conclude that as of May 2, 1985, when DER refused Consol's request that DER take action against George, DER had no basis for ordering George to cease drilling activities or to surrender its permits other than the fact (here assumed arguendo as established) that George's permits for wells 1 and 2 had lapsed by operation of law on April 18, 1985.

Consol asserts, but without citing any authority, that DER had the authority to take the action requested by Consol on the basis of the sole fact just stated, namely that George's permits had expired. We disagree with Consol on this crucial point. Rather, after a careful review of the Oil and Gas Act, particularly 52 P.S. §§601.503, 504 and 507, we agree with DER that DER had no authority to issue a cessation order to George, or to direct any other orders to George which in effect would have forbidden George to drill at sites 1 and 2 after May 2, 1985, in the absence of a finding by DER that George was in violation of the Oil and Gas Act or of other pertinent statutes and regulations, or was engaged in activity otherwise harmful to the public. In so holding we are not unmindful of the possibility that George -- in a few days drilling -- might permanently and possibly very adversely affect Consol's operation of its mine. On the other hand this possibility could have been the basis for an equity action by Consol in Common Pleas Court, to enjoin George from drilling. As we read the Oil and Gas Act, the legislature did not intend that DER -- in the absence of violations by George -- take actions against George for Consol's private benefit. Moreover, we believe that this principle embodies sound public policy; DER cannot be expected to take actions which favor one party's economic interests

over another's in the absence of violations triggering DER's enforcement powers. The thesis that in the absence of specific statutory authority to the contrary DER's actions should not be based on a balancing of competing private economic interests also underlies the Commonwealth Court's construction of the previously applicable statute, the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. §2202(b). Einsig v. Pennsylvania Mines Corporation, 69 Pa. Cmwlth 351, 452 A.2d 558 (1982). In short, on the basis of the facts DER knew or should have known at the time, DER's May 2, 1985 letter was not an abuse of DER's discretion.

We next consider whether the foregoing analysis requires modification in light of the fact that this Board evaluates the propriety of DER's actions in hearings de novo, wherein testimony concerning events that have occurred after DER's appealed-from actions often are admitted into evidence. Warren Sand and Gravel, Inc. v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975); Coolspring Township, et al. v. DER, Docket No. 81-134-G, 1983 EHB 151 at 200. When deciding whether to uphold a DER decision to forfeit surface mining bonds, we customarily admit evidence about conditons at the mining site as of the time of our hearing de novo, not merely as of the time DER decided to forfeit the bonds. Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183; King Coal Company v. DER, Docket No. 83-112-G (Adjudication, March 18, 1985). Similarly, when deciding whether to uphold a DER order requiring abatement of a discharge, chemical analyses of discharge samples taken after DER's order was issued customarily are admitted into evidence. Hepburnia Coal Company v. DER, Docket No. 85-309-G (Adjudication, May 28, 1986). Indeed, if we didn't allow evidence of observations made at times after DER's appealed-from action, a very large portion of the expert testimony regularly presented at Board hearings would not be admissible (a circumstance which would work

especial hardship on appellants, who generally have to rely on experts hired only after DER has taken its appealed-from action).

It must be recognized, however, that we allow testimony concerning events/observations occurring after DER's appealed-from action only because those events/observations are deemed relevant to the propriety of the DER action actually appealed from. Conditions at a mining site years after DER first forfeits a surface mining bond obviously can be relevant to the underlying issue (in bond forfeiture) of whether the site really had not been adequately reclaimed. A temporal history of the chemical analyses of a discharge obviously can be relevant to the issue of whether permanent chemical treatment of the discharge really is required. We do not accept testimony about events/observations occurring after DER's appealed-from action if such testimony would be pertinent only to the issue of whether DER should have taken action subsequent to the action which has been appealed. Whether DER should have taken subsequent action is not an issue before the Board when it is reviewing the original appealed-from action of DER. We have jurisdiction to review only those DER decisions which have been appealed to the Board.

Viewing the instant appeal in the context of the principles enunciated in the previous paragraph, we find no basis in our de novo hearing practice to modify our earlier conclusion that DER's May 2, 1985 letter was not an abuse of DER's discretion. We are not willing to regard Consol's April 30, 1985 request to DER, the request that was denied in DER's May 2, 1985 letter, as imposing a continuing obligation on DER (1) to continually review the facts concerning George's drilling activities at wells 1 and 2, and (2) to act to prevent George from drilling wells 1 and 2 just as soon as George's violations of the Oil and Gas Act are observed. In this appeal, George's actions after May 2, 1985, in particular

George's activities at wells 1 and 2 during June 1985 and thereafter, even if violations of the Oil and Gas Act as Consol alleges, are irrelevant to the issue before us, namely whether DER's May 2, 1985 letter was an abuse of discretion.

Therefore we grant DER's motion for partial summary judgment; that portion of this appeal relating to DER's May 2, 1985 refusal to act on wells 1 and 2 is dismissed. In so ruling we recognize that our treatment of DER's motion as a motion for summary judgment has been somewhat irregular, in view of the fact that some testimony already has been heard in this appeal. William J. Heck Builders, Inc. v. Marten, 462 A.2d 253 (Pa. Super, 1983). DER's motion was filed on January 8, 1986, however, well before testimony was first taken in this appeal, on January 27, 1986; thus Heck's proscription on summary judgment motions filed after trial has commenced has not been violated. As we wrote in a February 4, 1986 letter to the parties announcing our intention to rule on DER's motion as if a motion for summary judgment, we "cannot believe any party wants to prolong the 85-220-G appeal if that appeal [can] be decided on the completely legal . . . issue of DER's power to grant Consol's original request." In any event, because none of the parties objected to the Board's intention announced on February 4, 1986, and because all parties have briefed DER's motion and have in no way indicated any unwillingness to be bound by the Board's ruling on DER's motion, the Board deems waived any objections to our deciding any portion of this appeal on a motion for summary judgment.

ORDER

WHEREFORE, etc., for reasons explained in the foregoing Opinion, the portion of the above-captioned appeal concerned with George wells 1 and 2 is dismissed; the portion of the appeal concerned with well 4 remains before us. The previously scheduled hearing in this matter is cancelled, to be rescheduled when and if required.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling, Chairman

Edward Gerjuoy, Member

DATED: June 11, 1986
cc: Bureau of Litigation
Thomas C. Reed, Esq.
Henry Ingram, Esq.
Zelda Curtiss, Esq.
Patrick McGinley, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

TONY FERRARO :

:

: Docket No. 86-207-G

: Issued: June 16, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This appeal is dismissed as untimely filed. Appellant failed to file the appeal with the Board within thirty days of the date that appellant received notice of the DER action at issue.

OPINION

This appeal concerns DER's denial of appellant's application for a solid waste permit pursuant to the Solid Waste Management Act, 35 P.S. §6018.101 et seq. The issue which this opinion addresses is whether the appeal was timely filed. Pursuant to the Board's rules, and judicial precedent, the Board lacks jurisdiction over appeals which are filed more than thirty days after the date that the appellant has received notice of the DER action at issue. 25 Pa.Code §21.52(a); Rostosky v. DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976).

Upon receipt of the appeal, the Board Member to whom this appeal was assigned for handling issued a Rule to Show Cause to appellant, notifying him that it appeared that the appeal had not been filed within the thirty day period prescribed by the Board's rules. The Notice of Appeal (a form supplied by the

Board) was received by the Board on April 14, 1986, and states on its face that appellant received notice of the permit denial on March 2, 1986, well more than thirty days prior to April 14, 1986. In response to the Rule, appellant submitted a letter stating that he had received the DER letter embodying the permit denial on February 18, 1986 and that he had given it to his engineer so that the engineer could file an appeal of the denial with the Board. The appellant also states that his engineer then sent a letter to the Board on March 24, 1986 requesting forms and information concerning the filing of an appeal. In light of appellant's response to the Rule, the Board checked its files again to ascertain whether there in fact had been any correspondence received from appellant's engineer prior to April 14, 1986, the date that the Notice of Appeal form was received. Upon inspection it was revealed that on March 31, 1986 the Board had received a letter from appellant's engineer which read in toto as follows:

> Dear Sirs,
>
> Request for appeal form and regulations governing practice and procedure before the Board.
> CLIENT: Mr. Tony Ferraro
> I.D. #100427
> R.D. #7 (North Buffalo Township)
> Kittaning, PA 16201 (Armstrong County)
> SUBJECT: Bureau of Solid Waste Management
> Permit Denial for Phase I & II Solid Waste Permit Application and Follow-up letters dated 1-11, 1980, 8-12, 1980, and 8-10, 1982 respectively.
> REASON FOR DELAY IN REQUEST: Waiting for inspector to give timetable of DER action on use of landfill.
>
> THANK YOU,
>
> Carl L. Waugaman

Although the Board's normal procedure is to docket as a skeleton appeal any correspondence which conceivably could be construed as evidencing an

intent to file an appeal of a DER action, (see 25 Pa.Code §21.52(c)) this procedure was not followed here since it was not apparent to the Board staff who handled the request from Mr. Waugaman that it was his intent to file an appeal from any recent DER action. However, this failure to docket the correspondence from appellant's engineer as a skeleton appeal is immaterial here. Even granting that this appeal was filed with the Board on March 31, 1986, the appeal must be dismissed as untimely. In the letter which appellant sent in response to the Rule to Show Cause, appellant admits that he received DER's letter concerning the permit denial on February 18, 1986, which is more than thirty days prior to March 31st. Moreover, DER has filed a motion to dismiss this appeal as untimely, which is accompanied by a copy of a certified mail return receipt which indicates that appellant did receive notice of the permit denial on February 18, 1986. In short, this appeal was not filed with the Board within thirty days of the date appellant received notice of the permit denial. Therefore the Board lacks jurisdiction over this matter.

ORDER

WHEREFORE, this 16th day of June, 1986, it is ordered that this appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: June 16, 1986
cc: Tony Ferraro
Kenneth Bowman, Esq.
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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GLAH BROTHERS, INC. and FSI CORPORATION	:	
V.	:	**Docket No. 82-026-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 18, 1986

OPINION AND ORDER

Synopsis

Where there has been no activity at the docket for nearly four years and Appellants fail to respond to the Board's Rule to Show Cause, the appeal is dismissed pursuant to Rule 21.124 for lack of prosecution.

OPINION

By Notice of Appeal filed February 1, 1982, Appellants Glah Brothers, Inc. and FSI Corporation sought review from this Board of a December 31, 1981, order of the Department of Environmental Resources ("Department") directing Appellants to take various measures to avoid the recurrence of pollution incidents at a facility in Willistown Township, Chester County. The Department filed a motion to quash the appeal on February 17, 1982, alleging that Appellants had failed to properly perfect their appeal in accordance with Rule 21.51 in that they had failed to timely serve a copy on the Department's Bureau of Litigation. Appellants filed a response to the Motion, and the Board, in an order dated March 2, 1982, denied the Motion.

Appellants filed their pre-hearing memorandum on April 22, 1982, and the Department filed its answering pre-hearing memorandum on May 6, 1982. A pre-hearing conference was conducted by the Board on July 1, 1982.

After a hiatus of nearly a year, Appellants thereafter retained new counsel and requested that the Board delay the scheduling of a hearing because of ongoing settlement negotiations with the Department. The Board issued an order on June 21, 1983, continuing the matter until September 21, 1983, pending settlement negotiations. The matter was again continued at the parties' request until February 7, 1984. When the Board was advised of some progress in the settlement discussions, the matter was continued to November 1, 1984. After Appellants failed to submit a required status report, a default notice was sent by the Board. Counsel advised the Board that Appellants no longer retained him and that they had again retained their original counsel. By letter dated November 12, 1984, the Board was informed of various efforts undertaken by Appellants to comply with the Department's order. The Department, by letter of the same date, requested a hearing because of inability to reach a settlement. The Board scheduled a hearing on February 25-27, 1985, but the hearing was continued pending more settlement negotiations.

When no correspondence had been received from either party concerning the negotiations, the Board, by order dated October 31, 1985, requested a status report by November 13, 1985. The Department informed the Board in a letter dated November 5, 1985, that the parties were unable to reach an amicable resolution of the matter. When there was no further activity at the docket, the Board, on May 13, 1986, issued a rule upon Appellants to show cause why the appeal should not be dismissed for inactivity. Appellants were to respond on or before June 2, 1986, and, as of the date of this opinion and order, have not done so.

As we have recently stated in Springbrook Township v. DER, EHB Docket No. 84-122-M (opinion and order issued May 8, 1986), Appellants have a responsibility to diligently prosecute their appeal when attempts at resolution prove fruitless. The Board will not carry matters indefinitely on its dockets. The docket in this matter has been virtually inactive for the past four years. Appellants certainly should have reached some decision that settlement was not feasible by this point. In light of the inactivity at the docket, and Appellants' failure to respond to the Board's Rule to Show Cause, this matter will be dismissed pursuant to Rule 21.124.

ORDER

AND NOW, this 18th day of June, 1986, the Board's rule of May 13, 1986, is made absolute and the appeal of Glah Brothers, Inc. and FSI Corporation is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
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For Appellant:
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PIERSON & MORRIS, P.C.
Philadelphia, PA

DATED: June 18, 1986

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

MAYS CORPORATION, et al	:	
	:	
	:	
V.	:	**Docket No. 82-065-M**
	:	**(Consolidated with 82-117-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 18, 1986

OPINION AND ORDER

Synopsis

The Board dismisses appeals pursuant to Rule 21.124 for lack of prosecution because there has been no activity at the docket for nearly four years and Appellants failed to respond to the Board's rule to show cause why the appeals should not be dismissed.

OPINION

By Notice of Appeal filed February 26, 1982, Appellant Mays Corporation sought this Board's review of an order of the Department of Environmental Resources dated January 29, 1982, directing Appellant to correct alleged violations of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S.§691.1 et seq., and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et seq., caused by improper disposal of solid wastes at the Scott Mine in Jefferson Township, Washington County. That appeal was docketed at 82-065-M. An identical order was also issued by the Department on January 29, 1982, to Robert Mays, President of Mays Corporation, and a timely appeal from that order was filed with the Board on

February 26, 1982, and docketed at 82-117-M. The same counsel represented Appellant Mays Corporation and Appellant Robert Mays.

When Appellants failed to file their pre-hearing memoranda in accordance with the Board's orders, they were sent two default notices. When pre-hearing memoranda still were not filed, the Board, by order dated July 2, 1982, notified the Appellants that their appeals would be dismissed unless pre-hearing memoranda were filed by July 2, 1982. Thereafter, Appellants filed their pre-hearing memoranda on July 2, 1982. A pre-hearing conference was scheduled by the Board on August 5, 1982. After the filing of a stipulation by the parties on August 26, 1982, the Board consolidated these appeals at Docket No. 82-065-M in an order dated September 16, 1982. There has been no activity at this docket since the order of consolidation.

On May 13, 1986, the Board issued a rule upon the Appellants to show cause why their appeals should not be dismissed for inactivity. The rule was returnable on June 2, 1986, and, as of the date of this opinion and order, no response has been received from Appellants. Therefore, as a result of the lack of activity at this docket for nearly four years and Appellants' failure to respond to the Board's rule, this matter will be dismissed pursuant to Rule 21.124 for lack of prosecution.

ORDER

AND NOW, this 18th day of June, 1986, it is ordered that the appeals of Mays Corporation, EHB Docket No. 82-065-M and Robert Mays, EHB Docket No. 82-117-M, consolidated at EHB Docket No. 82-065-M, are dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

EDWARD SERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Barbara Brandon, Esq./DER Western

For Appellant:
Michael T. Stubna, Esq.
McKees Rocks, PA

DATED: June 18, 1986

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

K.M.& K. COAL COMPANY :
:
v. : EHB Docket No. 86-201-W
: Issued: June 24, 1986
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis:

A proposed Consent Assessement of Civil Penalty is not an appealable action pursuant to 25 Pa.Code §21.2(a).

OPINION

The above-captioned appeal is an appeal of a proposed Consent Assessment of Civil Penalty received by K.M.& K. Coal Company (Appellant) from the Department of Environmental Resources (DER) on or about March 28, 1986. Said consent assessment purports to be a mutual agreement between Appellant and DER, arrived at after some short period of negotiations. Appellant filed the above-captioned appeal on April 10, 1986, although it was not fully perfected until May 2, 1986. See 25 Pa.Code §21.52(b). On May 19, 1986, DER filed a Motion to Dismiss on the grounds that there was no appealable action by DER, and in the first alternative that the appeal was untimely, and in the second alternative that Appellant had violated the

Surface Mining Act and the Clean Streams Law by failing to post an appeal bond. On May 22, 1986, the Board wrote to Appellant advising it that an answer to the motion was due by June 2, 1986. As of the date of this opinion Appellant has made no response. Where a party fails to respond to a complaint or a motion, the Board may impose sanctions, including treating all relevant facts stated in such pleading as admitted. 25 Pa.Code §21.64(d). Thus the Board here treats all facts stated in DER's motion as admitted.

The origins of the consent assessment are not complicated. On November 29, 1985, DER issued a compliance order to Appellant for failure to submit certain corrections and additional information pertaining to an application for a mining permit. On January 22, 1986, DER issued a cease order to Appellant for failure to comply with the earlier order. Appellant did not appeal either order. On January 23, 1986, Appellant filed the requested information. At an informal impromptu meeting on March 4, 1986, DER informed Appellant that it had calculated a civil penalty of $950 in connection with the two orders. As a result of said meeting, DER prepared and sent the unsigned consent assessment dated March 26, 1986. DER did this believing Appellant had agreed to pay the civil penalty. Apparently, Appellant decided otherwise.

DER first argues that a consent assessment is not appealable to the Board pursuant to 25 Pa.Code §21.2(a). The Board finds it must agree. An appealable "action" is defined as:

> Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth;

> orders to abate air pollution; and appeals from and complaints for the assessent of civil penalties.

25 Pa.Code §21.2(a). In a similar case DER sent a letter to a coal company setting forth violations of the Surface Mining Act, and a proposal that the company make a specific penalty payment or create an escrow fund to avoid DER's filing of civil penalties. The company appealed, but pursuant to a motion by DER, the Board dismissed for lack of jurisdiction. Perry Brothers v. DER, 1981 EHB 583. In the case of Cooney Brothers Coal Co. v. DER, 1984 EHB 930, an appealing coal company sought review of a DER civil penalty worksheet that contained a proposed civil penalty. However, Cooney did not allege that a civil penalty had actually been assessed. The Board held that the situation was analogous to a simple notice of violation and dismissed. Cooney, supra. The Board has repeatedly held that a mere notice of violation without more is not an appealable action. Perry Brothers Coal Co. v. DER, 1982 EHB 501. See also, Sunbeam Coal Corp. v. DER, 8 Cmwlth. 622, 304 A.2d 169 (1973).

The present situation is similar to both Perry Brothers Coal Co. v. DER, 1981 EHB 583, and Cooney, supra. DER's motion states that DER has not formally assessed a civil penalty against Appellant. Appellant has not alleged otherwise. The consent assessment here has, as yet, no binding affect on the rights or property of Appellant. It is merely a proposed penalty amount, which Appellant is free to reject. As such, the Board finds that no appealable action is present.

As the Board finds there is no appealable action present, the Board need not reach DER's other contentions.

ORDER

AND NOW, this 24th day of June, 1986, it is ordered that for the reasons stated above, DER's motion to dismiss the above-captioned matter is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: June 24, 1986

cc: **Bureau of Litigation**
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bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOHN R. YENZI, JR. :

:

Docket No. 86-278-G

:

Issued: June 24, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant mailed his appeal to the Board's former address, because he prepared his appeal on an out-of-date Notice of Appeal form listing that address. But for the incorrect address, the appeal would have reached the Board within the thirty day period required by 25 Pa. Code §21.52(a); The Board actually received the appeal two days after the 30 day deadline. The Board's correct address has been published in the Pennsylvania Code for some time; the appealed-from letter to the appellant gave the Board's correct address. Therefore, the appeal must be dismissed as untimely filed. There is no reason, under the alleged facts, to grant permission to file the appeal nunc pro tunc; there has been no showing that the untimely filing resulted from any breakdown in the Board's procedures.

OPINION

On May 30, 1986 the Board received a Notice of Appeal from the above-captioned appellant, submitted by one Wilson Fisher, Jr. acting as the appellant's

agent. The Notice of Appeal stated, on its face, that notice of the DER action appealed-from was received April 28, 1986.

The Board's Rules and Regulations, specifically 25 Pa. Code §21.52(a), require that an appeal be filed "within 30 days after the party appellant has received written notice of such action." Therefore the Board, on its own motion, issued a rule to the appellant, to show cause why the appeal should not be dismissed as untimely filed. Mr. Fisher, who has identified himself as the president of Hess and Fisher Engineers, Inc., professional engineers, has responded to the aforesaid rule. Mr. Fisher's response, in its entire pertinent part, is as follows:

> - The appeal forms that we had on file provided the wrong address for the EHB (copy attached).
>
> - The appeal was posted on the morning of May 27, 1986, from Clearfield. The envelope was received in the regional post office (Altoona) on the same date. Delivery was apparently attempted in Harrisburg on May 28, 1986. We received the envelope back on May 29, 1986. (A copy of the envelope bears the post marks for the above post offices.)
>
> - Upon receipt of the envelope on May 29, 1986, we called the Environmental Hearing Board with regard to their address. The secretary provided the new address (see notations on envelope copy). The appeal was reposted on May 29, 1986 and apparently received on May 30, 1986.

Based upon the above information, we submit that the appeal was received in Harrisburg on the deadline date. Through no fault of the appellant, the appeal was not delivered. All parties, including the Postal Department expediently rectified the problem of the new Environmental Hearing Board address and the appeal was received within the EHB offices only two days late.

The attached form mentioned in the first paragraph of the above quotation listed the Board's former address at 112 Market Street, Harrisburg. As of August 1984, however, the Board's duly promulgated Rules and Regulations, in chapter 21 of the Pennsylvania Code, correctly list the Board's new address at 221 North Second Street, Harrisburg. 25 Pa.Code §§21.32(e) and 21.51(b). 25 Pa.Code

§21.11(a) states that the time of filing with the Board is determined by the "date of receipt by the Board." Under 1 Pa.Code §5.4, the August 1984 publication of the Board's North Second Street address in the Pennsylvania Code served as constructive notice to all parties that after August 1984 documents intended for filing with the Board should be mailed to North Second Street.

Under the facts summarized in the preceding paragraph, the Board must conclude that this appeal was not timely filed. Mr. Fisher has explained why the appeal first was mailed to the Board's former address, but this explanation does not override the plain requirements of the regulations that an appeal must be received by the Board within 30 days of an appellant's receipt of notice of the DER action appealed-from.

Nor does the appellant's untimely filing satisfy the requirements of 25 Pa.Code §21.53(a), for leave to file his appeal nunc pro tunc. To file nunc pro tunc, the untimely filing must be ascribable to a breakdown in the Board's operations. No such breakdown is suggested by Mr. Fisher's allegations. In the past, the Board has allowed an appeal nunc pro tunc when an untimely filing was caused by an initial mailing to the Board's former Market Street address, but in that appeal the Board's new address had not yet been published in the Pennsylvania Code. W. P. Stahlman Coal Company, Inc. v. DER, Docket No. 83-301-G, 1984 EHB 695. In the instant appeal, the appellant's mailing to the Board's former address occurred not merely in the face of the constructive notice discussed supra, but also in the face of the actual notice -- in the last paragraph of the appealed-from DER letter to the appellant -- that the appeal should be filed with the Board at the explicitly stated North Second Street Board address.

In sum, under the Board's established precedents, [Rostosky v. DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976); Eugene Petricca v. DER, Docket No. 83-239-G,

1984 EHB 519], the Board must dismiss this appeal for lack of jurisdiction.

ORDER

WHEREFORE, this 24th day of June, this appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: June 24, 1986
cc: Bureau of Litigation
For the Commonwealth:
Donna Morris, Esq.
Western Region

For the Appellant:
Wilson Fisher, Jr.
Hess & Fisher Engineers, Inc.
Clearfield, PA

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BRDARIC EXCAVATING, INC.	:	
	:	
	:	
V.	:	**Docket No. 85-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 24, 1986

OPINION AND ORDER

Synopsis

Discovery procedures before the Board are governed by the Pennsylvania Rules of Civil Procedure, except as modified by the Board's rules. 25 Pa. Code §21.111. Where the rules of discovery are violated, the Board may impose sanctions. Pa. R. Civ. P. 4019, 25 Pa. Code §21.124. Where a party fails to respond to discovery requests beyond the provided time period, the Board may impose sanctions. 25 Pa. Code §124. Parties may not extend time periods provided by the Board's rules without the express permission of the Board.

OPINION

The Board here rules upon a Motion for Sanctions filed by the Department of Environmental Resources (DER). This appeal was filed May 17, 1985. Brdaric Excavating, Inc. (Appellant) appeals DER's denial of a permit for a Class III Demolition Waste Disposal Site at the Bunker Hill Landfill, Kingston Township, Luzerne County. On July 16, 1985, DER filed its First Set of Interrogatories, First Request for Production of Documents, and First Set of

Requests for Admissions directed to Brdaric. On October 8, 1985, DER filed a Motion for Sanctions for failure of Appellant to respond to said discovery. On October 29, 1985, Appellant filed responses to said discovery requests and filed its Answer to DER's Motion for Sanctions. DER filed a Reply to Appellant's Answer on November 13, 1985.

DER's motion is based upon the claim that Appellant failed to timely respond to DER's discovery requests. Discovery before the Board is essentially governed by the Pennsylvania Rules of Civil Procedure, except as otherwise modified by the Board's own rules. 25 Pa. Code §21.111. Rule 4006 requires an answering party to serve a copy of the answers to interrogatories within thirty (30) days after service of the request. See, 25 Pa. Code §21.111(c). Rule 4009 requires a response to a Request for Production of Document within thirty (30) days after service of the request. See, 25 Pa. Code §21.111(d). Rule 4014 deems a matter requested in a Request for Admissions as admitted unless a response is served within thirty (30) days of the request. See, 25 Pa. Code §21.111(f). The Board's docket indicates that Appellant's responses were made well beyond the allotted thirty (30) day time periods. Appellant's Answer confirms the Board's docket. The docket also indicates that at no time did Appellant petition the Board for an extension of time.

Appellant argues in its Answer that it had obtained an extension of time from DER's counsel. In a letter dated December 5, 1985, the Board invited Appellant to support this position by way of documentation or affidavit. As of the date of this opinion, Appellant has failed to provide such documentation. The only evidence of such an agreement is a letter, provided in DER's Reply, dated August 13, 1985, from DER counsel Paul Simon to Appellant's counsel indicating DER's willingness to extend the time for a

response to discovery to no later than August 16, 1985. In any event no such agreement between the parties to extend filing deadlines is in any way binding upon the Board. It is the Board, and the Board alone that, at its own discretion upon a motion by a party before the expiration of the filing period, may extend a deadline. 25 Pa. Code §21.17. Surely Appellant's counsel should already be aware of this fact.

Appellant also claims that DER did not send the interrogatories to the Appellant. In support of this argument Appellant only refers the Board to a so-called "transmittal letter of July 16, 1985" from Paul Simon. There is no letter so dated in the Board's files, nor has Appellant seen fit to provide a copy. However, the Board does have a Certificate of Service dated and received on July 16, 1986, from DER which was attached to the original discovery materials which were properly filed with the Board. The Certificate of Service indicates that the discovery materials were served upon Appellant through his counsel on that date. This procedure is authorized by the Board's rules. 25 Pa. Code §21.111(b). In addition, it also seems clear from DER's letter of August 13, 1985, wherein DER consented to an extension to August 16, 1985, that Appellant must have had possession of the discovery materials as of that date.

The Board concludes that Appellant has violated the Rules of Civil Procedure and the Board's own rules pertaining to discovery matters. Both sets of rules provide for discretionary sanctions in such a situation. Pa. R. Civ. P. 4019 and 25 Pa. Code §21.124. In the present situation Appellant's failure to respond to discovery for more than sixty (60) days, although in fact not overly prejudicial, is still significant. A great deal of the parties' and the Board's time and energy have been needlessly spent in dealing with this discovery matter. Thus, the Board orders that all relevant

facts stated in DER's Request for Admissions shall be treated as admitted, and Appellant is barred from arguing or presenting evidence to the contrary. Pa. R. Civ. P. 4019, 25 Pa. Code §21.124. As Appellant has now responded to DER's discovery requests, the Board feels it is unnecessary to impose any further sanctions dealing with the Interrogatories and Request for Documents.

ORDER

AND NOW, this 24th day of June, 1986, the Board grants DER's Motion for Sanctions to the extent here stated. Matters stated in DER's Request for Admissions shall be treated as admitted and Appellant is barred from arguing or presenting in any way evidence to the contrary.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation

For the Commonwealth:
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Central Region

For the Appellant:
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Kingston, PA

DATED: June 24, 1986

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PITTSBURGH COAL AND COKE, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	**EHB Docket No. 85-430-W**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: June 27, 1986
VICO, INC., Permittee	:	
and	:	
STANDARD AGGREGATES, INC., Intervenor	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis:

The Board holds that a correction to a mining permit to conform it with the conditions of the mine drainage permit covering the same mining operation did not constitute an adjudication for purposes of review by the Board. In addition, the challenge to the correction is a prohibited collateral attack on the provisions of the mine drainage permit authorizing reclamation by terrace backfilling.

OPINION

Pittsburgh Coal and Coke, Inc. ("Pittsburgh") initiated this matter by the filing of a Notice of Appeal with the Board on October 17, 1985. The Notice of Appeal challenged the Department of Environmental Resources' ("Department") correction of Mining Permit 30206-26800401-01-0 ("the mining permit") to allow the use of terracing as the means of reclamation in a permit issued to VICO, Inc. ("VICO") to conduct non-coal surface mining at a site in Georges Township, Fayette County, commonly referred to as the Laurel

Quarry. The Department's stated reason for the correction was to conform the mining permit to the terms and conditions of Mine Drainage Permit No. 26800401 ("the mine drainage permit") relating to the use of terrace backfilling. The mining permit apparently contained inconsistent language regarding the method of reclamation. Pittsburgh owns a portion of the property encompassed by the mine drainage and mining permits. Leonard Stephens of Pittsburgh was informed of the Department's correction in a letter dated September 24, 1985. A timely appeal and a petition for supersedeas were thereafter filed with the Board.

On November 12, 1985, Standard Aggregates, Inc., which is currently conducting mining at the Laurel Quarry, filed a Petition to Intervene with the Board. The petition was amended on November 21, 1985, and intervention was granted by the Board in an order dated November 26, 1985. A supersedeas hearing was held on December 5, 1985, and supersedeas was denied by order dated April 16, 1986. An opinion confirming that denial of supersedeas, principally because it was unlikely Pittsburgh would succeed on the merits, was issued on April 29, 1986.

Both Standard Aggregates and VICO asserted in their briefs in opposition to the supersedeas request that Pittsburgh was unlikely to succeed on the merits of its appeal because the Department action challenged by Pittsburgh did not constitute an adjudication of the Department for purposes of review by this Board. In the alternative, they argued that Pittsburgh was unlikely to succeed on the merits because Pittsburgh's appeal of the correction of the mining permit is a prohibited collateral attack on the terms and conditions of the mine drainage permit which Pittsburgh previously did not challenge before this Board. These arguments were again raised in a motion to dismiss the appeal filed by Standard Aggregates on March 10, 1986, which was joined

in by VICO on that same date.

This Board has frequently ruled upon the issue of whether a particular Department action constitutes an adjudication for purposes of invoking our jurisdiction. We have applied the criteria enunciated in Man O'War Racing Association v. State Horse Racing Association, 433 Pa. 432, 250 A.2d 172 (1969) in making this determination, e.g. James E. Martin, t/d/b/a James E. Martin Coal Company v. DER, 1984 736. These criteria are:

> 1) Was the decision (whose appealability is in question) of an adjudicative nature, involving an exercise of discretion under individual facts?
>
> 2) Does public policy require the decision to be appealable?
>
> 3) Did the decision substantially affect property rights?

Applying each of these criteria to the permit correction leads to the conclusion that it did not constitute an adjudication.

The Department's correction of the mining permit in this instance did not involve any exercise of discretion, largely because of the system for regulation of mining activity. Surface non-coal mining was regulated under both the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("the Clean Streams Law") and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA").[1] Section 315 of the Clean Streams Law requires that a permit be obtained to operate any mine and prescribes the submission of detailed data to ascertain the effect of a

---

[1] The portions of SMCRA relating to non-coal surface mining were repealed by the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, 52 P.S. §3301 et seq. Because the Department action at issue is the mere correction of a clerical error, the new non-coal statute did not apply. See Opinion and Order Sur Petition for Supersedeas.

proposed mining operation on the waters of the Commonwealth within the drainage area to be affected by the proposed mining activity. Section 4 of SMCRA also requires that a permit be obtained to conduct surface mining activities and that an application for a permit contain detailed data relating to operating methods and reclamation means. No permit for surface mining activities could be issued under the Clean Streams Law unless the applicant demonstrated compliance with SMCRA.[2] Similarly, no permit for surface mining activities could be issued under SMCRA unless the operator demonstrated compliance with the Clean Streams Law.[3] The mine drainage permit, which is issued under the Clean Streams Law, authorizes the overall mining operation from the hydrologic standpoint, while the mining permit may only authorize particular mining activity within the overall drainage area.[4] See Robert Kwalwasser v. DER, EHB Docket No. 84-108-G (opinion filed January 24, 1986).

The mine drainage permit issued to VICO unambiguously provided for terracing as the method of restoration. Special condition 4 stated:

> 4. This permit is approved for:
> a. _____ approximate original contour
> b. __x__ terrace
> c. _____ water impoundment
> d. _____ other (solid waste disposal site)
> reclamation of the area affected by this operation.
> (Intervenor's Exhibit 1)[5]

The mining permit, which was issued on the same day as the mine drainage

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2 §315(f) of the Clean Streams Law, 35 P.S. §691.315(F).

3 §4(a)(2)(H) of SMCRA, 52 P.S. §1396.4(a)(2)(H).

4 The numbering systems for the mine drainage and mining permits reflect this relationship. The mining permit numbers are keyed to the mine drainage permit number.

5 References are to exhibits admitted into evidence at the supersedeas hearing of December 5, 1985.

permit by the same Department official, had apparently inconsistent conditions. The first standard condition in the mining permit provided:

> STANDARD CONDITIONS __x__ Mining shall be done in accordance with all general and special conditions contained in the Mine Drainage Permit No. 26800401
>
> (Intervenor's Exhibit 2)

The mine drainage permit, as quoted above, provided for terracing as the means of reclamation. But, the section of the mining permit denoted "Restoration Plan" indicated:

> RESTORATION PLAN __x__ Restoration plan is approved for approx. original contour as indicated on the maps and in agreement with Supplement "B". The restoration shall be done in accordance with the present guidelines approved by the former Land Reclamation Board, as amended June 7, 1967 or amendments hereafter adopted by the Department.
>
> (Intervenor's Exhibit 2)

Another inconsistency within the mining permit appeared in Special Condition 3 which read:

> 3. All highwall affected or reaffected subsequent to January 1, 1972 shall be sloped to a maximum angle of 35 degrees from the horizontal.
>
> (Intervenor's Exhibit 2)

Such a special condition is consistent with terracing (N.T. 153, 159).[6] Inasmuch as the mine drainage permit, which recognizes terracing as the authorized means of reclamation, is the cornerstone of the regulatory system, and the mining permit itself indicates terrace backfilling in two portions, the notation of approximate original contour in the Restoration Plan section of the mining permit was undoubtedly an oversight or clerical error. The September, 1985, correction of the mining permit was nothing more than a ministerial act on the part of the Department.

With regard to the second test enunciated in Man O'War Racing Ass'n,

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[6] Notes of testimony from the December 5, 1985, supersedeas hearing.

supra, we believe that there are public policy reasons for not permitting actions such as the Department's in this case to be appealable. We cannot condone sloppy or inept administration of any regulatory program by the Department. On the other hand, in circumstances such as this, the Board must be aware of the effect on a permittee, who, through no fault of its own, would be subjected to complex notification procedures to correct inconsequential and insignificant oversights and errors, thus occasioning losses in time and revenues. No valid environmental protection purpose would be served either, as scarce Department resources would become fragmented as they are diverted to deal with matters which are extremely trivial. Our ruling here, however, is a narrow one which is not intended as a means for the Department to avoid public participation procedures where a change is truly something more than the rectification of an obvious error. Those situations must, as has been done here, be analyzed in the context of the permit applications and supporting documents, the language of the permits, and common sense.

Lastly, we must analyze whether the correction substantially affected any of Pittsburgh's property rights. Pittsburgh may have, as a condition of its mineral lease with VICO, some expectation and rights regarding reclamation of its property. But, the Board cannot enforce any private right created by a lease between Pittsburgh and VICO, Inc., especially where the law authorizes reclamation by terracing.

In sum, under the criteria enunciated in Man O'War we see no reason to regard this correction of VICO's permit as an appealable action of DER's. We stress that normally an appealable DER action does not cause our jurisdiction to attach, i. e., normally we would not hold a supersedeas hearing, or take testimony of any kind, in an appeal of an unappealable action. In the instant

appeal, however, the fact that DER's action was ministerial was not apparent from the initial pleadings; testimony was necessary to ascertain this crucial feature. Finally, we remark (although we need not do so to justify dismissal of the appeal) that once we have decided DER's action merely was a correction of the mining permit to make it consistent with the governing mine drainage permit--then even if the correction were to be characterized as a Department adjudication--Pittsburgh's objections are nothing more than a thinly-disguised and prohibited collateral attack on the terracing conditions in the mine drainage permit. The mine drainage permit was issued by the Department on May 21, 1981, and notice of that issuance was published at 11 Pa. B. 1973 (June 6, 1981). Section 21.52(a) of the Board's rules of practice and procedure provides that an appeal of the mine drainage permit issuance should have been lodged within 30 days of Pittsburgh's receiving actual notice or publication in the Pennsylvania Bulletin, whichever was earlier. Pittsburgh, admittedly, did not appeal the 1981 issuance of the mine drainage permit and Pittsburgh cannot, in the guise of a challenge to a correction of the mining permit issued four years later, attack the provisions of the mine drainage permit allowing terrace backfilling. Toro Development Co. v. DER et al., 56 Pa. Cmwlth 471, 425 A.2d 1163 (1981) and Lower Paxton Township Authority et al. v. DER et al., 1982 EHB 111, 128.

ORDER

AND NOW, this 27th day of June, 1986, it is ordered that for the foregoing reasons, the motion to dismiss filed by Intervenor Standard Aggregates and Permittee VICO, Inc. is granted and the appeal of Pittsburgh Coal and Coke, Inc. docketed at 85-430-W is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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DATED: June 27, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WILLIAM J. McINTIRE COAL COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 83-180-M

Issued: July 7, 1986

ADJUDICATION

By the Board

SYLLABUS

Each of the four appeals consolidated at the above docket number is dismissed. DER properly exercised its duties and functions with regard to each of the four actions at issue. Pursuant to section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), mine operators are responsible for pollutional discharges which they have allowed to emanate from their mining sites regardless of whether they have caused the discharges and regardless of whether their actions have or have not caused the discharges to become worse. Subcontractors conducting surface mining operations are responsible for all violations of law at the site attributable to the permittee which result from activities in which the subcontractors participate. Individual partners are responsible for all violations of law attributable to the partnership. The mining activities at the site at issue here were conducted by a subcontractor to the permittee. There exist violations at the site which are attributed to the permittee's mining operations. The subcontractor was a partnership. Therefore, the individual partners are individually jointly and severally liable with the permittee for the violations existing at the site.

In an appeal of the denial of a mining license the appellant bears the burden of proof. 52 P.S. §1396.3a; 25 Pa.Code §21.101(c). RGM Inc. failed to sustain its burden with regard to DER's refusal to renew its mining license. In the first denial of the mining license, DER acted properly pursuant to 52 P.S. §1396.3a because the sole officer and shareholder of the corporation at the time of the denial was in violation of the Commonwealth's mining laws by virtue of his being a partner in the partnership which is responsible for the violations existing at the Heilman Mine. The appellant failed to sustain its burden of proof of demonstrating that its officer, who was engaging in unlawful conduct under SMCRA, no longer was exercising the functions normally associated with the position of corporate officer. The transfer of stock to the wife of the officer was merely a sham transaction designed to circumvent the requirements of §1396.3a of SMCRA.

DER cannot be expected to condone mining without a license, in violation of 52 P.S. §1396.3a(a). Such violations are serious. Therefore, DER properly exercised its duties and functions in ordering cessation of surface mining where the mining was being conducted after DER properly had denied the operator's surface mining license.

FINDINGS OF FACT*

1. The Appellee in these consolidated appeals is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law,

*References to the transcripts will be to the transcript number and page number. Transcript I is the transcript of the supersedeas hearing at Docket No. 83-136-M. Transcript II is the transcript of the supersedeas hearing at Docket No. 83-180-M. Transcript III is the transcript of the hearing on the merits of the consolidated appeals. Similarly, exhibits will be identified by reference to the hearing at which they were introduced. For example, Exhibit A II 1 is the first of appellant's exhibits introduced during the second hearing (the supersedeas hearing at Docket No. 83-180-M); Exhibit C I 1 similarly indicates the first Commonwealth exhbit introduced at the first hearing.

the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17A and the Rules and Regulations of the Environmental Quality Board adopted thereunder.

2. The Appellant at the appeals originally filed at Docket Nos. 83-136-M, 83-161-M and 84-039-M is R. G. McIntire Coal Co., Inc. ("RGM, Inc."), a Pennsylvania corporation with a mailing address of R.D. 1, Box 220, Kittanning, Pennsylvania 16201.

3. The Appellants at the appeal originally filed at Docket No. 83-180-M are William J. McIntire Coal Co., Inc. ("WJM, Inc."), a Pennsylvania corporation which has a mailing address of Box 171, Shelocta, Pennsylvania 15777, William J. McIntire, who has the same mailing address, and Ronald G. McIntire, who has a mailing address of R.D. 1, Box 220, Kittanning, Pennsylvania 16201.

4. William J. McIntire and Ronald G. McIntire are brothers (Exhibit A I 6).

5. WJM, Inc. is the permittee for a surface mine located in Manor Township, Armstrong County, which was operated pursuant to Mining Permit Numbers 638-4, 638-4(A) and 638-4(A2) and Mine Drainage Permit ("MDP") Number 3574SM42, which surface mine is located on the property of Ray Heilman (the "Heilman Mine").

6. The Heilman Mine was surface mined by the McIntires between 1975 or 1976 and 1979. (Exhibit C III 1. T I 10, T I 94, and Exhibit A III I).

7. The surface mining and reclamation activities which were performed at the Heilman Mine were performed by M&M Coal Company ("M&M") (T I 71 and T II 143) as a subcontractor for WJM, Inc. (T II 154)

8. M&M was a partnership. (T I 79 and Exhibit A I 4).

9. The sole partners of M&M were William J. McIntire and Ronald G. McIntire. (T I 78 and 79 and T II 143).

10. William J. McIntire and Ronald G. McIntire equally shared the responsibilities for supervising the surface mining operations of M&M at the Heilman Mine. (T II 143, 156)

11. Ronald G. McIntire and William J. McIntire shared equally in the profits of M&M (T II 155).

12. During the time that the Heilman Mine was being mined and reclaimed, Ronald G. McIntire was the Secretary of WJM, Inc. and acted on behalf of WJM, Inc. in responding to notices of violation from the Department. (T I 69-70; Exhibits C III 4 and C III 5).

13. At all times relevant to this proceeding William J. McIntire was the President and Treasurer of WJM, Inc. (T. I 66)

14. WJM, Inc. mined the Heilman Mine (through its subcontractor M&M) pursuant to a lease agreement between the landowner (Heilman) and WJM, Inc. (T. II 144)

15. RGM, Inc. was the permittee for a surface mine in Plumcreek Township, Armstrong County, known as the Plumcreek Township Site.

The Heilman Mine Site

16. The McIntires affected approximately 62 acres through their surface mining activities at the Heilman Mine. (Exhibit A III 1)

17. The removal of coal was completed at the Heilman Mine in 1979.

18. Before the McIntires conducted surface mining operations at the Heilman Mine, DER Inspector Snyder conducted a pre-mining survey during which he took water samples in the vicinity of the Heilman Mine. Inspector Snyder also

noted the existence of abandoned deep mine entries in the coal crop line in the ravine adjacent to the Ray Heilman Residence ("Heilman Ravine"). (Exhibit A II 1)

19. Water samples taken by Inspector Snyder during this pre-mining survey indicate that the water discharging from the abandoned deep mines in the Heilman Ravine was in violation of DER effluent limits, i.e. it was acid mine drainage ("AMD"). (Exhibit A II 1; T II 35-6, T III 365)

20. Inspector Snyder died in 1983, prior to the date of the hearings in this matter, and therefore was unavailable to testify concerning his pre-mining survey.

21. The abandoned deep mine or mines in the vicinity of the Heilman Ravine were in the same seam of coal that was surface mined by the McIntires. (T I 83; T II 68, T III 42).

22. The discharges to the Heilman Ravine from the Heilman Mine continued to exceed DER effluent limitations after the cessation of the McIntires' mining activities at the Mine. (T III 352, 365; Exhibits C II 1, C II 3).

23. These discharges form a small stream which flows into Garrett Run. (T II 34-5; Exhibit A II 2).

24. The discharges are the subject of the DER order of July 29, 1983 which was appealed at EHB Docket No. 83-180-M.

25. The discharges of AMD in the Heilman Ravine are not being treated by the McIntires or anyone else. (T I 76).

26. The untreated discharges of AMD are causing pollution of the waters of the Commonwealth.

27. The discharge area for a site is the place where the ground water from the site discharges to the surface. (T II 73).

28. The discharge area for water entering the portion of the Heilman mine located upgradient from the Heilman Ravine is the Heilman Ravine. (T II 182-83).

29. The recharge area for a discharge is the area where the groundwater system which supplies the discharge receives water from the surface. (T II 72).

30. The recharge area for the discharges in the Heilman Ravine includes the majority of the area which was surface mined by the McIntires at the Heilman Mine. (T III 379, T II 73).

31. The dip of the strata underlying the Heilman mine is to the west and southwest, i.e., toward the Heilman Ravine. Therefore, the groundwater from the majority of the Heilman site flows toward the Heilman Ravine. (T II 72, 181).

32. The AMD discharging in the Heilman Ravine flows through the geographic area of the Heilman Mine which was surface mined by the McIntires. (T III 368, T II 74, 144, 195).

33. The AMD discharges in the Heilman Ravine emanate from the ground within the boundaries of MDP 3574SM42 and the boundaries of the mining permit for the Heilman mine. (T II 72-3; Exhibit A II 2).

34. The crop line of a coal seam is the place where the coal seam is naturally exposed or is covered with soil only. (T II 71).

35. The AMD discharges in the Heilman Ravine are in the vicinity of the crop line of the coal seam which the McIntires surface mined and are also in the vicinity of the pre-existing abandoned deep mine entries. (Exhibit A II 2; T II 175, T III 291).

36. The McIntires covered the area of the old deep mine entries with spoil from their surface mining operation; therefore, the entries no longer are visible. (T II 144-45; T III 206).

37. The McIntires mined everything between the low wall, high wall and end walls at the Heilman mine, including any areas which previously had been deep mined. (T III 32-3).

38. The crop line barrier at the Heilman mine is the portion of the mined coal seam which is left in place between the crop line and the area where the McIntires surface mined the coal. (T II 71, T III 24).

39. MDP 3574SM42 required that the mine operator leave only a 25 foot crop line barrier. (T III 91; Exhibit C III 3).

40. Instead of leaving a 25 foot crop line barrier the McIntires left a barrier of from 100 to 125 feet. (T II 144).

41. The only portion of the abandoned deep mines which remained after the McIntires mined the Heilman Mine is the portion that exists in the crop line barrier in the vicinity of the Heilman Ravine. (T II 70, 144).

42. The deep mine workings in the crop line barrier in the vicinity of the Heilman Ravine create a natural condition for the development of AMD and are likely to be a primary source of the AMD which is discharging to the Heilman Ravine. (T II 27, 65-66).

43. By leaving a crop line barrier wider than 25 feet the McIntires increased the amount of deep mine workings left at the site, thereby increasing the potential for AMD. (T III 34; T II 27).

44. The reason that the McIntires did not remove more of the crop line barrier is that the coal was not worth mining. It would not have been impossible for the McIntires to have mined more of the coal and leave only a 25 foot crop line barrier as required by MDP 3574SM42. (T III 33, 53).

45. An additional potential source for the AMD discharging to the Heilman Ravine is the coal refuse which the McIntires placed in the pit on the Heilman mine during the course of their surface mining activities. (T II 65-66).

46. The McIntires first received complaints from the Department concerning the AMD discharges in the Heilman Ravine in 1978 when they received a

Notice of Violation from the Department. The McIntires responded to the November, 1978 Notice of Violation by trying to seal up the Heilman Mine site and stop the AMD and by treating the discharges. (T I 74-5).

47. During the time the McIntires were actively mining the Heilman mine they did not analyze any samples of the AMD in the Heilman Ravine. (T I 85, 117).

48. Dr. Streib, the McIntire's expert, has no personal knowledge of the number or the extent of deep mines present on the site before the McIntires commenced their mining operations, because at the time of his first visit to the site the area of the McIntire's mining operations had been backfilled. The deep mine entries and mine voids were no longer visible. (T III 371, 375; T II 8, 68, 107)

49. None of the witnesses who testified at the hearing had personal knowledge of the actual extent of the old deep mine workings in the vicinity of the Heilman Mine. However, during the course of their surface mining operations at the mine, the McIntires periodically encountered old deep mine workings. Old deep mine voids were encountered in the high wall, the low wall and the western end wall. (T III 30-32, T I 83-84.)

Denial of RGM Inc.'s Surface Mining Licenses

50. By a letter dated June 20, 1983 DER denied the application of RGM Inc. to renew its surface mining license for 1983. RGM Inc. appealed this denial to the Board, which docketed the appeal #83-136-M; this same appeal subsequently was consolidated at Docket No. 83-180-M.

51. Ronald G. McIntire was the sole incorporator, sole shareholder and sole officer of RGM Inc. until July 12, 1983. (T I 100)

52. On July 12, 1983 Ronald G. McIntire transferred all his stock in RGM Inc. to Helen McIntire, his wife, and resigned as the sole officer and director of RGM Inc. (T I 104-107).

53. The sole reason for the transfer of stock to Helen McIntire and Ronald G. McIntire's resignation as a director was the McIntires' desire to avoid difficulty with DER in securing a surface mining license. That is, Ronald G. McIntire recognized that it was unlikely that he would receive a license from DER. (T I 50, 57, 104, 123, 140).

54. The $5,000.00 which Helen McIntire paid Ronald G. McIntire when she purchased his RGM, Inc. stock was paid out of a joint checking account of Helen McIntire and her husband Ronald G. McIntire and the $5,000.00 was deposited in another joint account of Helen and Ronald G. McIntire. (T I 105, 123)

55. At the time of the sale of the RGM, Inc. stock to Helen McIntire, RGM, Inc.'s accountant made no attempt to determine if Helen McIntire had sufficient independent net worth to be able to pay the $140,000.00 demand note. (T I 58)

56. There is no collateral backing the demand note which Helen McIntire gave Ronald G. McIntire when she purchased his RGM, Inc. stock. (T I 58)

57. There is no payment schedule on the demand note which Helen McIntire gave Ronald G. McIntire for his RGM, Inc. stock. (T I 124)

58. Since the sale of Ronald G. McIntire's stock in RGM, Inc. to his wife, Ronald G. McIntire received no payment from his wife on the sale of the stock. (T III 275)

59. Ronald G. McIntire would not take action to recover on the note if Helen McIntire defaulted on payment. (T I 125).

60. Helen McIntire is not knowledgeable about coal or the surface mining operational aspects of RGM Inc. (T III 277).

61. Ronald G. McIntire probably will consult with Helen McIntire regarding the operation of RGM, Inc. (T I 142)

62. Helen McIntire admitted that the foremen working for RGM, Inc. continued to report to Ronald McIntire after the transfer of stock to Helen McIntire and Ronald McIntire's resignation from corporate office. (T I 146)

63. After the sale of Ronald G. McIntire's stock in RGM, Inc. and his resignation as the sole officer and director, Helen McIntire resubmitted an application for a surface mining license for RGM, Inc., on July 19, 1983. (T I 141)

64. DER denied the license application submitted by Helen McIntire in a letter dated January 23, 1984. RGM, Inc. appealed the denial to the Board which docketed it at #84-039-M and subsequently consolidated it at 83-180-M.

The Plumcreek Township Site Cessation Order

65. On July 22, 1983, the Department issued an order to RGM, Inc., at its Plum Creek Township, Armstrong County surface mining site, directing RGM, Inc. to cease further surface mining activities, because RGM, Inc. was mining after its license renewal application had been denied.

66. RGM, Inc. appealed the July 22, 1983 cessation order to the Board which docketed the appeal at #83-161-M and subsequently consolidated it at #83-180-M.

67. On July 22, 1983 RGM, Inc. was engaged in surface mining activities, i.e., overburden removal, at the Plumcreek Township site. (T I 39).

68. RJM, Inc. had received written notice prior to July 22, 1983 -- via the license denial letter of June 20, 1983 -- that "the commencement or continuation of any surface mining activities without a 1983 Operator's License is illegal and prohibited by law." (Exhibit A I 10).

A. INTRODUCTION

This case involves four appeals which have been consolidated at the above-captioned docket number. The first of the appeals is from DER's refusal to renew the 1983 surface mining license of R. G. McIntire Coal Company, Inc. ("RGM Inc."). (This appeal originally was docketed at #83-136-M). The refusal was embodied in a letter dated June 20, 1983. DER denied the license on the basis that Ronald G. McIntire, the president of RGM Inc., was in violation of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., ("SMCRA") and the Clean Streams Law, 35 P.S. §691.1 et seq. ("CSL"). The violations were alleged to exist on a mine site known as the Heilman Mine, which had been mined under the authority of a permit issued to William J. McIntire Coal Company, Inc. ("WJM Inc.") Mining operations at the Heilman Mine were carried out by a partnership, M&M Coal Company, which was made up of two partners: William J. McIntire and Ronald G. McIntire. During the period of time that mining operations were conducted at the Heilman Mine, Ronald G. McIntire was the secretary of WJM Inc.. Based upon these findings, DER concluded that it was unable to renew RGM Inc.'s 1983 surface mining license because §1396.3a of SMCRA (as it existed on the date of the license denial) provided that an application for a mining license must be denied if the applicant, or a partner, associate or officer of the applicant, was in violaton of SMCRA, the rules and regulations promulgated thereunder, or the terms and conditions of any permit or license issued by DER, unless the applicant had satisfied DER that the unlawful conduct was being corrected. 52 P.S. §1396.3a. (SMCRA has been amended since the date of the license denial at issue here. Act of December 20, 1983, P.L. 278, No. 74; Act of October 12, 1984, P.L. 916, No. 181. This adjudication, however, applies the provisions of the law in effect as of the date of the DER actions at issue.)

The second appeal (originally docketed at 83-161-M) is an appeal by Ronald

G. McIntire Coal Company, Inc. ("RGM Inc.") from a cessation order issued to it by DER on July 22, 1983. The order was based on DER's finding that RGM Inc. was conducting surface mining operations at a site in Plumcreek Township, Armstrong County, without a valid surface mining license. As noted above, RGM Inc.'s license had been denied on June 20, 1983.

The third appeal at issue (docket No.83-180-M) is taken from an administrative order issued by DER to WJM Inc., William J. McIntire and Ronald G. McIntire on August 2, 1983. This order was based upon DER's finding that discharges of acid mine drainage were emanating from the Heilman mine causing pollution of the waters of the Commonwealth in violation of SMCRA, CSL and DER regulations. The order directs the three parties to collect and treat the discharges.

The fourth appeal (originally docketed at 84-039-G) is an appeal by RGM Inc. from DER's refusal to grant it a 1984 surface mining license. The DER denial was based upon DER's finding that RGM Inc. or associated companies had been and continued to be in violation of the Commonwealth's mining laws.

During the course of litigation in these matters two supersedeas hearings were held and writs of supersedeas granted (in the appeals originally docketed at numbers 83-136-M and 83-180-M). The parties have stipulated that the record developed during the supersedeas hearings is to be treated as a portion of the hearing on the merits of these appeals. The hearing on the merits took place on May 2 and 3, 1984.

B. RESPONSIBILITY UNDER THE CLEAN STREAMS LAW FOR DISCHARGES FROM MINES

DER's administrative order of August 2, 1983 directs WJM Inc., William J. McIntire and Ronald G. McIntire to collect and treat discharges from the Heilman Mine. DER's order relied upon section 315(a) of the CSL which provides in relevant part:

Operation of Mines

> (a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, refuse disposal, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372, No. 194). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance.
> 35 P.S. §691.315(a).

Section 315(a) clearly prohibits any person from allowing a discharge from a mine that does not meet the effluent limitations of the permit for the mine or the effluent limits of DER regulations, provided the mine was operated after January 1, 1966 under circumstances requiring a permit under section 315(b) of the CSL, as it existed after the 1965 amendments to that statute. Section 315(b), as amended, provided in part as follows:

> It shall be unlawful to open, reopen, or continue in operation any coal mine, or to change or alter any approved plan of drainage and disposal of industrial wastes, unless and until the Board[1]. . . has issued a permit approving the plan or change of plan. . . .
> P.L. 372, No. 194 §5 (August 23, 1965).

The McIntires began mining operations at the Heilman Mine in 1975 or 1976. Thus, it is apparent that a permit was required prior to the commencement of mining operations and that section 315(a), supra, is applicable to discharges occurring

1. References to "the Board" are to the Sanitary Water Board, a predecessor agency of DER. See 71 P.S. §510-1(22).

after mining operations ceased.

The discharges which DER has ordered the McIntires to collect and treat are located in what has been referred to as the Heilman Ravine. Prior to the McIntires' mining operations at the Heilman Mine, a DER mine inspector, during a pre-mining survey, had noted the existence of abandoned deep mine entries in the ravine. Analyses of samples of water discharging from the entries indicated that the discharges were in violation of the effluent limitations established by DER regulations. The discharges which are the subject of the order at issue emanate from the ground in the vicinity of the old deep mine entries. During the course of their mining operations, however, the McIntires covered the area of the entries with spoil and therefore the entries no longer are visible. The presently existing discharges likewise are in violation of DER effluent limits.

The McIntires rely upon the fact that the discharges in the Heilman Ravine existed before they commenced mining at the Heilman mine to support their argument that they should not be held responsible for collecting and treating the same. They contend that they neither caused the discharges nor did they make them worse, and that therefore liability cannot be imposed upon them.

The law of this Commonwealth concerning a mine operator's liability for discharges pursuant to section 315(a) of the CSL is clear. Under that provision there is no requirement that the operator have caused the discharge or that its activities have made the discharge worse before liability attaches. The leading case construing section 315 is Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903. One of the issues presented to the Court in Harmar was whether section 315 required a mine operator to treat all the water it pumped from its mine where the majority of that water was not

generated by the operator's mining activities but rather was fugitive water from abandoned adjacent mines. The Court held that Harmar Coal could be required to treat all the water, noting that §315(a) indicates that "the legislature was not concerned with the source of the polluted water for that section provides, in part, that '[n]o person or municipality shall operate a mine or allow a discharge from a mine.' . . . While [the mine operators] may not be responsible for polluting all the water, they certainly harm the Commonwealth by discharging that water into the surface waters." 306 A.2d at 318. In reaching this conclusion the Court repeatedly emphasized the legislative purpose expressed in section 4 of the 1965 amendments to the CSL:

> It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted . . . 306 A.2d at 313 and at 321 (emphasis supplied by the Court).

Another leading case concerning the responsibility of a mine operator under section 315(a) is Barnes and Tucker Company v. Commonwealth, DER, 455 Pa. 392, 319 A.2d 871 (1974) (Barnes and Tucker I). Barnes and Tucker I is primarily a nuisance case; however, section 315(a) was considered by the Court in its opinion. The issue in that case as in Harmar Coal was whether a mine operator could be held responsible for a post-mining pollutional discharge from its mine, much of which was generated from adjacent abandoned mines, notwithstanding that it had operated and closed the mine in full compliance with applicable laws, regulations and the permits for the mine. The Court held that the operator could be held liable under both common law and statutory nuisance theories. In holding that the discharge constituted a statutory nuisance under section 3 of the CSL (which states that the discharge of any polluting substance to the waters of the Commonwealth constitutes a nuisance) the

Court went on to say that section 315, on its face, also would provide a basis for imposing liability on the mine operator. Section 315(a) provides that a discharge from a mine which is in violation of DER requirements likewise constitutes a nuisance. Thus, taken together, Harmar Coal and Barnes and Tucker make clear that under §315(a) a mine operator is responsible for treatment of post-mining discharges from its mine if the discharges do not meet applicable effluent limits. This is so regardless of the source of the polluted water (i.e., whether it is coming from abandoned deep mines), regardless of the fact that the discharges were pre-existing, i.e., the operator did not directly cause the discharges, and regardless of the fact that the operator operated the mine in full compliance with the law.

This Board has followed this interpretation of section 315(a) in several decisions. In Adam Greece, d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135 (Adjudication dated August 8, 1980), DER had issued an order under §315 to a mine operator requiring the abatement of post-mining discharges from its deep mine after mining operations had ceased. The operator argued that liability could not be imposed upon it without some showing of its responsibility for causing the discharge. In rejecting this argument the Board specifically held that section 315 places upon a mine operator the responsibility for abating pollutional discharges from its mine, whether during or after completion of the operation, and regardless of the reason for the discharge. 1980 EHB at 141. Liability is not dependent upon the conduct of the operator under section 315 but stems entirely from the fact that the mine was operated. This holding is consistent with the statement of the Supreme Court in Commonwealth v. Barnes and Tucker Company, (Barnes and Tucker II), 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed 434 U.S. 807, that under the CSL "it is not the source of the polluted water itself, but the source of the

discharge of the acid mine water into the waters of the Commonwealth" which is important. In other words if the discharge is coming from the area which the operator mined, section 315(a) imposes liability upon the operator for treatment, since the operator is "allowing" a discharge from its mine. See also John E. Kaites et al. v. DER, EHB Docket No. 84-104-G (Opinion and Order dated August 7, 1985) (holding that section 315(a) imposes liability on a mine operator for post-mining pollutional discharges regardless of the reason for the discharge) and Hawk Contracting Inc. and Adam Eidemiller Inc. v. DER, 1981 EHB 150 (Adjudication dated December 2, 1981) (holding that a mine operator can be held responsible for any pollutional discharge from its mining site if the discharge merely passes through the site.)

The polluting discharges in the Heilman Ravine (which are the subject of the order at issue) emanate from the ground within the boundaries of the mine drainage permit and one of the mining permits for the Heilman Mine. The McIntires' expert geologist, Dr. Streib, admitted that the recharge area for the discharges includes the majority of the area which the McIntires surface mined and, more specifically, that the water discharging at the Heilman Ravine first passes through the area of the mine affected by the McIntires' surface mining operations. Dr. Streib also admitted that one of two possible significant sources of the acid discharges are the several tons of coal refuse which the McIntires placed in the pit on the mine site during the course of their mining operations. The abandoned deep mines themselves are another likely source; however, these mines were located within the same seam of coal that the McIntires mined, and the discharges in the Heilman Ravine are in the vicinity of the crop line of this coal seam. In addition, the McIntires mined through significant portions of the old deep mines during the course of their surface mining. Deep mine voids were encountered in the high wall, the

low wall and the western end wall. Moreover the mine drainage permit for the site required that only a 25 foot crop line barrier remain after the mining was completed. Compliance with this condition would have reduced the potential for development of acid mine drainage from the crop line and the portions of the deep mines which remained within the barrier. The McIntires, however, failed to comply with this condition of the permit, leaving a crop line barrier of between 100 and 125 feet, thereby increasing the potential for acid drainage to develop.

In sum, we conclude that the discharges to the Heilman Ravine constitute a statutory nuisance under §315(a), violations of 25 Pa.Code §86.102 (the DER effluent limitations) and violations of the conditions of Mine Drainage Permit No. 3574SM42, which also prescribes effluent limitations for discharges from the Heilman Mine. Consequently, the persons responsible for allowing these discharges to occur are in violation of the CSL, and DER rules and regulations.

The McIntires have argued that DER failed to take action to require the McIntires to correct the discharges until April of 1981 and that this failure constitutes laches on the part of DER precluding our holding the McIntires responsible for the discharges. We note, first, that the record reveals that the McIntires first received notice that DER considered the discharges to the Heilman Ravine to be their responsibility in November of 1978 when they received a Notice of Violation concerning the same. (In fact, they responded to the Notice by attempting to seal areas of the mine site and by treating the discharges.) In any event, this argument was squarely addressed and rejected by the Pennsylvania Supreme Court in Barnes and Tucker I, supra, wherein the Court stated that "stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth no matter how long their conduct has been tolerated." 319 A.2d

at 884. Therefore, we conclude that the laches argument must fail.

We note the McIntires' argument that the case of National Wood Preservers Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980, appeal dismissed 449 U.S. 803, would preclude our holding the McIntires liable for the discharges to the Heilman Ravine. They contend that National Wood stands for the proposition that the Clean Streams Law does not impose strict liability on a land occupier for pollutional conditions on its land, but requires a showing that it is responsible for the pollution, in the sense that it somehow must have caused it.

National Wood was a case construing section 316 of the CSL; it did not address the liability of mine operators under section 315(a) for allowing discharges from their mines. Section 315(a) provides an entirely independent basis for liability here. Moreover, as we recently held in Tenth Street Building Corporation v. DER, EHB Docket No. 85-068-G (Opinion dated November 1, 1985), National Wood does not preclude a finding of liability for conditions which the land owner or occupier did not itself create. Indeed, the Court there stated that "the notion of fault is least functional when balancing the interests of a property owner against the interests of a state in the exercise of its police power, because the beneficiary is not an individual but the community." National Wood, 414 A.2d at 46, n. 18 (citing Barnes and Tucker I, supra.) In any event, although we need not rest our holding herein on liability under §316 of the CSL, since §315(a) does provide an independent basis for liability, we note that under the holdings of Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa.Cmwlth 443, 387 A.2d 142 (1978),[2] liability could

2. Philadelphia Chewing Gum was affirmed in part and reversed in part in National Wood Preservers, supra, the reversal does not affect the holding of the lower court on the issue of adoption of a pre-existing pollutional condition.

be assigned on the basis of land occupancy where the mine operator knew of the polluting condition and positively associated itself with it, e.g., by mining through the abandoned deep mines on the Heilman site (which were the undisputed source of the polluting discharges prior to the McIntire's mining operations). See Philadelphia Chewing Gum, 387 A.2d at 150.

Joint and Several Liability

The next issue which we must address is which of the parties to whom DER directed the order of July 29, 1983 may be held liable for the discharges. WJM Inc., being the permittee under the Mine Drainage Permit and Mining Permits for the Heilman Mine, unquestionably is legally responsible for the discharges. Harmar Coal, supra; Barnes and Tucker I, supra.

The liability of subcontractors to the permittee for violations attributed to the permittee is addressed by SMCRA. Section 1396.3 states that "where more than one person is engaged in surface mining activities in a single operation, they shall be deemed jointly and severally responsible for compliance with the provisions of this act." (The act defines "person" to include "any natural person, partnership, association or corporation", inter alia). In addition, section 1396.3a provides that "independent subcontractors . . . shall be jointly and severally liable with the permittee" for violations in which the subcontractor participates. See also Black Fox Mining and Development Corp. v. DER, EHB Docket No. 84-114-G (Adjudication issued April 29, 1985); Keystone Mining Company, Inc. v. DER, EHB Docket No. 83-241-G (Opinion dated June 19, 1985). Both of these decisions hold that under SMCRA subcontractors are jointly and severally liable with the permittee for violations of the Commonwealth's mining laws. This statutory liability of subcontractors is consistent with the general principle of agency law

that an agent is legally responsible for the consequences of its own conduct and jointly and severally responsible with its principal for harm that results from the agent's conduct. (See Restatement (Second) Agency §343).

At the Heilman Mine, M & M Coal Company ("M & M"), a partnership consisting of William J. McIntire and Ronald G. McIntire, was the subcontractor. M & M performed all the mining and reclamation activities at the Heilman Mine, including the disposal of the old deep mine coal refuse, the mining out of the old deep mines, and leaving the 100 to 125 foot crop barrier. Since all the mining and reclamation activities at the Heilman Mine were performed by M & M, M & M is jointly and severally liable with WJM Inc. for all violations of law that are associated with the surface mining of the Heilman Mine.

Since M & M is a partnership, any legal responsibility attributable to it is attributable to its partners, William J. McIntire and Ronald G. McIntire. Section 325 of the Uniform Partnership Act, 59 Pa. C.S. §325 provides that a partnership is responsible for wrongful acts of the partners and 59 Pa. C.S. §327 provides that all partners are jointly and severally liable for everything related to wrongful acts of any partner in a partnership. These provisions of the Uniform Partnership Act are consistent with case law in Pennsylvania where the courts have consistently held that the liability of a partner is indistinguishable from any liability charged to the partnership. In Re Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941); Tax Review Board of Philadelphia v. D.H. Shapiro Company, 409 Pa. 253, 185 A.2d 529 (1962).

There is abundant evidence in the record that William J. McIntire and Ronald G. McIntire both personally supervised the day-to-day mining and reclamation operations of the Heilman Mine. William testified that when he was present he was in charge and that when he was not present Ronald was in charge. Ronald

testified that he and William shared the supervisory and management functions equally. Furthermore, William and Ronald shared equally in the profits of M & M. Therefore, we conclude that the individuals William J. McIntire and Ronald G. McIntire are jointly and severally liable with WJM Inc. for the unauthorized discharges to the Heilman Ravine.

C. DENIAL OF MINING LICENSES TO RGM INC.

1. Denial of the 1983 Surface Mining License.

By a letter dated June 20, 1983, DER denied the request of RGM Inc. to renew its surface mining license for 1983. The refusal to renew was based upon the provisions of section §1396.3a of SMCRA which as of June 20, 1983 read in relevant part:

> . . . Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in Section 18.6 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor of subcontractor which has engaged in such unlawful conduct shall be denied any license or permit required by this act unless the license or permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department . . .

The quoted provision imposed a mandatory duty upon DER to deny the license application of any corporate applicant which had an officer which had engaged in unlawful conduct unless the applicant demonstrated that the unlawful conduct was being corrected to the satisfaction of the Department. Section 18.6 of SMCRA 52 P.S. §1396.24, provides that:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, or to cause air or water pollution in connection with mining and not otherwise proscribed by this act . . .

As of June 20, 1983 the discharges from the Heilman Mine to the Heilman Ravine were in violation of DER effluent limitations and also in violation of the conditions of Mine Drainage Permit No. 3574SM42. As we have concluded above, Ronald McIntire is liable for the abatement of those discharges by virtue of his being a partner in the partnership which performed the surface mining activities at the Heilman Mine as a subcontractor for WJM Inc. Therefore, it is clear that as of the date DER denied the 1983 license renewal, Ronald McIntire was engaged in unlawful conduct within the meaning of section 18.6 of SMCRA by failing to treat the discharges. Thus, DER was under a mandatory duty to deny RGM Inc.'s license and properly exercised its duties and functions in doing so.

2. Denial of the 1984 Surface Mining License

Prior to July 7, 1983 Ronald McIntire was the sole officer, director and shareholder of RGM Inc. On or about that date, after receiving notice of the denial of RGM Inc.'s 1983 surface mining license, Ronald McIntire transferred all the stock of RGM Inc. to his wife, Helen McIntire, and resigned from his offices with RGM Inc. Shortly thereafter Helen McIntire submitted a revised license renewal application to DER on behalf of RGM Inc. for a 1984 surface mining license. By a letter dated January 23, 1984 DER denied the revised license application, again relying on section 3.1(b) of SMCRA, supra. The denial was based upon DER's finding that RGM Inc. had not demonstrated that Ronald McIntire was no longer an officer or associate of RGM Inc.

In an appeal of a license denial the appellant bears the burden of proof. 52 P.S. §1396.3a; 25 Pa.Code §21.101(c)(1). Under the present circumstances this means that it is RGM Inc.'s burden to demonstrate by a preponderance of the

evidence that Ronald McIntire is not continuing to carry out the duties normally associated with the position of officer or director of RGM Inc., i.e., that he is not a person with significant responsibility for managing RGM Inc.'s surface mining operations. Concerned Citizens of Jefferson Township v. DER and Grindstone Coal Co., EHB Docket No. 83-269-G (Adjudication dated March 5, 1986). We conclude that RGM Inc. has failed to meet its burden on this issue.

We note preliminarily that each of the witnesses called by RGM Inc. concerning the transfer of stock to Helen McIntire testified that the purpose for the transfer was to avoid problems with DER in connection with the renewal of the surface mining license. In other words, the purpose of the transfer was to attempt to avoid the mandate of section 1396.3a, which proscribes issuance of a license to a corporation when its officer has engaged in unlawful conduct. Ronald McIntire admitted that he transferred the stock to Helen McIntire because he expected that DER would not issue him a mining license. RGM Inc.'s accountant likewise testified that the purpose behind the transfer was to avoid the DER license block. The motive behind the transaction, of course, is not determinative here. If Ronald McIntire in fact relinquished control over the affairs of RGM Inc. via this stock transaction his motive in so doing would be immaterial. However, where the admitted purpose of the transaction is to avoid the restrictions placed upon surface mining operators by section 3.1(b), the parties' actions should be carefully scrutinized to determine that a bona fide transfer of control over the affairs of the corporation has taken place.

Helen McIntire admitted that Ronald McIntire continued to exercise control over the affairs of RGM Inc. after the transfer of the stock and his resignation from corporate office. She stated that the foremen working for RGM Inc. continued to report to her husband after the stock transfer. She admitted that although she

maintains certain monthly reports for RGM Inc. she has no knowledge concerning the operational aspects of surface mining, e.g., coal seams, equipment used, and the like. She also stated that she expected to employ Ronald McIntire as a consultant. Since the date of the first license denial, however, RGM Inc. has been unable to engage in surface coal mining operations in Pennsylvania, and therefore there apparently has been little need for advice concerning the company's mining operations.

Moreover, it is readily apparent that the transfer of the stock to Helen McIntire was not a bona fide transfer for value. In order for any contract for sale to be legally valid there must be an exchange of consideration. Stelmack v. Glen Alden Coal Company, 339 Pa. 410, 14 A.2d 127 (1940). Consideration is a bargained for exchange, evidenced by a benefit to the promisee and a detriment to the promisor. Estate of Beck, 489 Pa. 276, 414 A.2d 65 (1980). The record establishes that the $5000 which Helen McIntire paid to Ronald McIntire as a downpayment for the transfer of stock was drawn on one checking account held jointly by Helen and Ronald McIntire and deposited in another account held by both of them. Therefore, it is clear that this $5000 sum cannot represent consideration for the stock since there was no benefit to the promisee or detriment to the promisor. The balance of the purchase price for the shares was secured by a demand note executed by Helen McIntire in favor of Ronald McIntire. The note was secured only by the shares themselves, however, and no schedule for repayment was established. Indeed, Ronald McIntire stated that if Helen were unable to repay the note he expected that he would do nothing about it. No inquiry was made by RGM Inc's accountant concerning Helen McIntire's independent net worth, i.e., whether she actually would be able to repay the debt. In light of the foregoing we conclude that the sale of the stock of RGM Inc. was merely a sham transaction, that RGM Inc. has failed to meet its burden of showing

that Ronald McIntire is no longer exercising significant control over the affairs of the corporation, and that therefore DER properly decided to deny RGM Inc's 1984 surface mining license.

D. THE CESSATION ORDER TO RGM INC.

The appeal of RGM Inc. from the first license nonrenewal was filed with the Board on or about July 11, 1983. On July 22, 1983, DER determined that RGM Inc. was conducting surface mining (removing overburden) at its Plumcreek Township, Armstrong County surface mine and therefore issued an order to RGM Inc. directing the cessation of further surface mining activities.

Pursuant to §1396.4c of SMCRA, DER may issue such orders as are necessary to aid in the enforcement of the Act, including, inter alia, orders requiring the cessation of surface mining operations. Conducting surface mining operations without a license is a violation of section 3.1(a) of SMCRA, 52 P.S. §1396.3a(a). The Board has held that it is reasonable for the Department to issue orders requiring the cessation of unpermitted surface mining activities. Western Hickory Coal Company v. DER, 1983 EHB 89 (Adjudication issued June 2, 1983). We there stated that mining without a permit is "a serious violation which DER cannot be expected to countenance." 1983 EHB at 107-8. Likewise, mining without a license is a serious violation which DER cannot be expected to allow. In the instant case RGM Inc. was mining without a license after receipt of notice of the denial of its application to renew the license. Therefore DER acted reasonably and according to law in ordering the cessation of RGM Inc.'s unlicensed surface mining activities.

CONCLUSIONS OF LAW

1. Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a) prohibits any person who operates a mine from allowing a discharge from the mine unless

the discharge complies with DER regulations or the permit for the mine. Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973) appeal dismissed 415 U.S. 903; Commonwealth v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871 (1974) (Barnes & Tucker I).

2. Since the discharges from the Heilman Mine do not meet the effluent limits of the DER regulations, the discharges constitute a statutory public nuisance. 35 P.S. §691.315(a).

3. DER is authorized to order any condition which is declared by law to be a nuisance to be abated or removed. 71 P.S. §510-17.

4. In determining liability for post-mining discharges under §315(a) of the Clean Streams Law it is not necessary to conclude that the mine operator caused the discharge or that its activities made the discharges worse. 35 P.S. §691.315; Harmar Coal; Barnes and Tucker I.

5. The failures of WJM, Inc., M&M, William J. McIntire, and Ronald G. McIntire to collect and treat the AMD discharges at the Heilman Mine constitute violations of the Surface Mining Act, the Clean Streams Law, the conditions of the mine drainage permit for the Heilman Mine, and DER regulations. 52 P.S. §1396.24; 35 P.S. §691.315(a), Standard Conditions 10, 11 and 12 of Mine Drainage Permit 3574SM42; 25 Pa. Code §86.102.

6. Individual partners are responsible for all violations of law attributable to the partnership. 59 Pa. C.S. §327; In re Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941); and Tax Review Board of Philadelphia v. D.H. Shapiro Company, 409 Pa. 253, 185 A.2d 529 (1962).

7. Subcontractors at surface mining sites are jointly and severally responsible with permittees for violations of law which result from activities in which the subcontractors participate. 52 P.S. §1396.3a; 52 P.S. §1396.3;

Black Fox Mining and Development Corp. v. DER, EHB Docket No. 84-114-G Adjudication dated April 29, 1985; Keystone Mining Co. Inc. v. DER, EHB Docket No. 83-241-G (Opinion dated June 19, 1985).

8. As individual partners in M&M Coal Co., William J. McIntire and Ronald G. McIntire are personally, jointly and severally responsible with WJM Inc. for violations of law attributable to the surface mining activities at the Heilman Mine.

9. DER properly exercised its discretionary authority in issuing the order of July 29, 1983 to WJM Inc., William J. McIntire and Ronald G. McIntire.

10. With respect to its appeals from the denial of its requests to renew its surface mining license, RGM Inc., has the burden of proof. 52 P.S. §1396.3a; 25 Pa. Code §21.101(c)(1).

11. DER acted reasonably and according to law when it refused to renew the 1983 surface mining license of RGM Inc. because, at the time of the non-renewal, Ronald G. McIntire was the sole officer, shareholder and director of RGM, Inc. and Ronald G. McIntire was engaging in continuing unlawful conduct by failing to treat the polluting discharges at the Heilman Mine. 52 P.S. §1396.3a.

12. RGM Inc. failed to sustain its burden of proof concerning the denial of its 1984 mining license. DER acted reasonably and according to law in refusing to grant RGM Inc.'s 1984 license renewal application.

13. DER properly exercised its duties and functions when on July 22, 1983 it ordered RGM Inc. to cease mining at its Plumcreek Township operation, because RGM Inc. was mining without a surface mining license, contrary to the requirements of SMCRA. 52 P.S. §1396.3a.

14. Stream polluters can acquire no prescriptive right to pollute no matter how long their conduct has been tolerated. Barnes and Tucker I.

ORDER

WHEREFORE, this 7th day of July, 1986, it is ordered that the appeals consolidated at EHB Docket No. 83-180-M are dismissed. The writs of supersedeas granted in the appeals originally docketed at 83-136-M and 83-180-M are vacated.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

cc: Bureau of Litigation

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DATED: July 7, 1986

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M. DIANE SMITH
SECRETARY TO THE BOARD

SUPERVISORS OF HAMILTON TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 86-094-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 9, 1986
	:	
MONROE COUNTY, Intervenor	:	

OPINION AND ORDER

Synopsis:

An appeal is dismissed as untimely because the appeal was not filed with the Board within thirty days of the date upon which Appellant received notice of the Department's order.

OPINION

On January 14, 1986 the Department of Environmental Resources (Department) issued an order directing Hamilton Township to revise its Official Sewage Facilities Plan as required by the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. 750.5(b). The Appellants, the Supervisors of Hamilton Township (Township), received notice of this order on January 15, 1986. See Appellants' Notice of Appeal, EHB Docket No. 86-094-W. The Appellants' Notice of Appeal was received by the Board on February 18, 1986.

The Board's rules of practice and procedure provide that the Board does not have jurisdiction to hear an appeal unless "the appeal is in writing and it is filed with the Board within 30 days after the party appellant has

received written notice. . ." 25 Pa.Code §21.52(a). Furthermore, Rule 21.11(a) states the date of receipt of a Notice of Appeal by the Board is determinative on the issue of timeliness, not the date of deposit of the pleading in the mail. Thirty-four days had elapsed between the Township's receipt of DER's order and the receipt of the Notice of Appeal by the Board. Since the Township's Notice of Appeal was not received by the Board within the required thirty day period, the Board lacks jurisdiction to consider the Township's appeal. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761, 763 (1976).

The Township appears to assert in its Answer to Motion to Dismiss Appeal (Item 12) that filing a Notice of Appeal with the DER and the Bureau of Litigation within the thirty day period perfects an appellant's right of appeal before the Board. This assertion is without merit. Rule 21.51 unambiguously states commencement of an appeal from an action of the Department is initiated by the filing of a written notice of appeal with the Board. Filing with the DER or Bureau of Litigation does not substitute for filing with the Board, and will not remedy an otherwise untimely filing. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761, 763 (1976); Delta Mining, Inc. v. DER, EHB Docket No. 85-484-G (May 1, 1986); Fuel Transportation Company, Inc. v. DER, EHB Docket No. 85-360-M (November 13, 1985).

ORDER

WHEREFORE, in light of the foregoing, it is ordered that this appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: July 9, 1986

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IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	No. 39 W.D. Appeal Docket 1985
v.	:	
	:	Commonwealth Court No. 2083 C.D. 1983
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

DETERMINATION BY THE ENVIRONMENTAL HEARING BOARD ON REMAND

TO THE HONORABLE, THE JUSTICES OF THE PENNSYLVANIA SUPREME COURT:

This matter has come before the Environmental Hearing Board as a result of an order issued by this Honorable Court on April 17, 1986. The order directed this Board to make a determination concerning the possibility of inspecting an existing hazardous waste disposal facility in order to ascertain its suitability for hazardous waste disposal under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), and the rules and regulations adopted thereunder at 25 Pa.Code §75.1 et seq. The facility which is the subject of the order was constructed by William Fiore, d/b/a Municipal and Industrial Disposal Company, and is commonly referred to as the Phase II Pit.

Hearings were conducted by Board Chairman Maxine Woelfling on May 19 to 22, 1986. Based on the testimony adduced at these hearings, the Board concludes that it is not possible to conduct an inspection of the Phase II Pit to determine its suitability for hazardous waste disposal. In support of our conclusion, we make the following findings of fact.

FINDINGS OF FACT

1. Municipal and Industrial Disposal Company ("MIDC") has constructed a hazardous waste disposal facility in Elizabeth Township, Allegheny County. A portion of that facility, commonly referred to as the "Phase II Pit," is at issue in the instant proceeding.

2. The site occupied by the Phase II Pit was previously strip-mined. (N.T. 74, 157, 371)

3. Garbage was previously disposed of in the area now occupied by the Phase II Pit. (N.T. 74, 157)

4. Openings to abandoned deep mines were visible in 1980-1982 in the area of what is now the north and west walls of the Phase II Pit. (N.T. 372- 373; Appellant's Ex. 6; and Commonwealth's Ex. 2, 3, and 4)

5. The Phase II Pit rests on the underclay of the Pittsburgh coal seam. (N.T. 422)

6. The underclay of the Pittsburgh coal seam constitutes the base of the groundwater table in the area. (N.T. 187-188)

7. When the permit application for the Phase II permit was submitted to the Department, it indicated that the groundwater table was nine feet above the underclay. (N.T. 466, 467)

8. Construction of the Phase II Pit was initiated in Spring, 1982, and completed in June, 1984. (N.T. 371)

9. The primary liner of the Phase II Pit was constructed of material from the Carmichael's formation and consisted of an outwash deposit with a large degree of fines, silts, and clays. (N.T. 147)

10. Clay liners are highly variable. (N.T. 582-584)

11. No liner, clay or otherwise, is impermeable. (N.T. 602)

12. The Phase II Pit has a double liner on its base, with a leak

detection zone between the two liners, and a single liner along the sidewall. (N.T. 324)

13. The sub-base of the Phase II Pit is in the groundwater table. (N.T. 438)

14. A leachate collection zone and a protective cover zone, as required by 25 Pa.Code §75.264(v)(3)(xiv)(E), were never installed at the Phase II Pit. (N.T. 324, 354)

15. The sidewalls of the Phase II Pit have no leachate detection zone or secondary liner. (N.T. 424)

16. The slope of the sidewalls of the liner is 2:1, or 67%. (N.T. 425, 456)

17. NUS Corporation employees observed the construction of the Phase II Pit. (N.T. 502)

18. One hundred forty (140) nuclear densometer readings were taken from materials in the Phase II Pit over a period of 3 days. (N.T. 264)

19. No tests were performed on the material from the borrow area for the Phase II Pit. (N.T. 504)

20. The material for the Phase I Pit was taken from the same borrow area as the Phase II Pit. (N.T. 506)

21. Testing was performed on the material taken from the borrow area for the Phase I Pit. (N.T. 506)

22. Information about the Phase I Pit is of limited value in analyzing the suitability of the Phase II Pit for waste disposal. (N.T. 596)

23. No tests were made of the material used in the primary or secondary liners, the leachate detection zone, and the sub-base of the Phase II Pit. (N.T. 503, 504)

24. The Phase II Pit liner has been exposed to the elements since

the completion of construction in June, 1984. (N.T. 334)

25. Visible, as well as microscopic, cracks have formed in the liner as a result of exposure to the freeze/thaw cycle; these cracks affect the permeability of the liner. (N.T. 334, 335)

26. Municipal and Industrial Disposal Company has retained NUS Corporation, a nationally recognized consulting firm, to develop a program for testing the suitability of the Phase II Pit. (N.T. 11, 62)

27. Daniel Threlfall, who is presently Director of Industrial Projects for the PEC Division of NUS Corporation, has a bachelor's degree in geology and was Project Manager for NUS Corporation during the construction of the Phase II Pit. (N.T. 106-107)

28. Mr. Threlfall has never performed permeability tests on core samples from an existing clay liner, although he has evaluated liners at various existing facilities. (N.T. 118-120, 133)

29. William Trimbath, who has a bachelor's and master's degree in civil engineering and who is a doctoral candidate, is the NUS employee who designed a proposed testing program for MIDC to determine the suitability of the Phase II Pit for waste disposal. (N.T. 203, 206)

30. Mr. Trimbath has been involved in the design and construction of clay liners and has performed on-site field testing of bottom liners. (N.T. 208, 212-213)

31. Dr. David E. Daniel, the Commonwealth's expert, is an Associate Professor of Civil Engineering at the University of Texas at Austin; he obtained his doctorate in civil engineering with a dissertation entitled "Moisture Movement in Soils in the Vicinity of Waste Disposal Sites." (N.T. 515, Commonwealth's Ex. 6)

32. Dr. Daniel has extensive experience as a researcher and as a

consultant in evaluating clay liners and waste disposal sites. (Commonwealth Ex. 6)

33. Dr. Daniel is Chairman of the American Society for Testing and Materials' (ASTM) subcommittee on soil permeability standards and is writing two of the proposed ASTM standards for laboratory permeability testing. (N.T. 530-531)

34. Dr. Daniel has also conducted research aimed at the development of field permeability testing and research into the effectivensss of resealing test holes in clay liners. (N.T. 534-535, 571)

35. There are a number of scientific disciplines involved in the development of any testing protocol. An examination must be made of relevant literature and existing field data in designing a program. (N.T. 109, 226)

36. Each site must be evaluated individually in determining appropriate testing procedures. (N.T. 41)

37. The NUS testing program is designed to determine whether the Phase II Pit met the design standards contained in the Department's regulations in 1979, the time when the Phase II Pit was designed. (N.T. 66, 69)

38. While the testing program developed by NUS will utilize field testing to confirm laboratory tests, NUS had no particular field tests in mind when it developed the program. (N.T. 179-180, 244-245)

39. The NUS testing program is designed to minimize disturbance of the Phase II Pit. (N.T. 225, 364)

40. The NUS program proposes 63 test borings over a ten acre site; the volume of material excavated in these borings would account for only one, one-hundred-thousandth (1/100,000) of the volume of the Phase II Pit liner. (N.T. 286, 290, 564)

41. It is difficult to get reliable results from the analysis of core samples because the material may be disturbed in the process of boring. (N.T. 181)

42. The NUS program proposes to determine the slope and thickness of the sub-base of the Phase II Pit; the slope will be determined by plotting the elevations at which the test borings encounter the sub-base. (N.T. 194, 302, 303)

43. The sub-base must be exposed either by large diameter test borings or the excavation of test sites to determine whether the sub-base is compacted to 95% of standard Proctor density, as required by 25 Pa.Code §75.264(v)(3)(xiv)(A). (N.T. 192, 306, 554)

44. The only way to determine the permeability of the secondary, or bottom, liner is to pond water over its entire surface and measure the water passing through. The absence of an impermeable geomembrane beneath the secondary liner precludes the use of this technique. (N.T. 559-562)

45. In all likelihood, all material on top of the secondary liner would have to be removed in order to determine its permeability. (N.T. 561)

46. In order to determine whether the permeability of the flow zone in the leachate detection zone is greater than $1x10^{-4}$ cm/sec, as required by 25 Pa.Code §75.264(v)(3)(xiv)(C), material must be sampled and analyzed for grain size, which, in turn, can be related to permeability. (N.T. 195, 571-573)

47. A softball to football size sample is necessary for each evaluation of the leachate detection zone. (N.T. 571-573)

48. The characteristics of the primary liner would be determined in the same manner as the characteristics of the secondary liner. (N.T. 575, 576)

49. The material placed back in the test boring holes will not be the same type of material as excavated from the liners; grout, cement, or bentonite will be placed as a seal. (N.T. 317-318)

50. The holes created by the test borings in the leachate detection zone will be backfilled with granular material. (N.T. 322)

51. The seals would have to be tested to determine their permeability; if one uses the double-ring infiltrometer test to do so, the seal would be ruined. (N.T. 231-232, 319)

52. It has never been proven whether seals of test holes can be tested to determine whether the permeability of the seal in the liner material is less than $1x10^{-7}$ cm/sec. (N.T. 571)

53. There is no proven method for testing the sidewalls of the Phase II Pit. (N.T. 553, 561, 575, 580)

54. The NUS testing program proposes the use of 9 double-ring infiltrometer tests to determine the field permeability of the Phase II Pit liner. (N.T. 309)

55. Techniques for in-field soil permeability testing are still evolving. (N.T. 309)

56. Of the techniques used for in-field testing of soil permeability, the double-ring infiltrometer test is the most adequate. (N.T. 533)

57. The double-ring infiltrometer test was never intended for use in clay. (N.T. 534)

58. The double-ring infiltrometer test is not reliable for permeabilities of less than $1x10^{-7}$ cm/sec because the rate of loss through poor seals or evaporation exceeds the rate of infiltration; the test is also subject to error due to the effects of temperature. (N.T. 536)

59. Putting the issue of reliability at a permeability of less than

$1x10^{-7}$ cm/sec aside, the number of double-ring infiltrometer tests would have to fully cover the area of the Phase II Pit liner. (N.T. 562)

60. Laboratory permeability tests by themselves are not accurate to determine permeability, since the results can be 10 to 1000 times lower than field results. (N.T. 587)

61. There are no accepted engineering standards for determining either the field or laboratory permeability of soils. (N.T. 530-531)

62. The NUS testing program cannot determine whether the secondary, or bottom liner, will divert all leachate or waste to a collection sump, as required by 25 Pa.Code §75.264(v)(3)(xiv)(B). (N.T. 350-351)

63. The NUS testing program cannot determine if the primary liner of the Phase II Pit is capable of diverting leachate to a collection sump, as required by 25 Pa.Code §75.264(v)(3)(xiv)(D). (N.T. 353)

64. The NUS testing program is inadequate because there are an insufficient number of exploratory excavations of the liner. (N.T. 579-580)

65. Without a sufficient number of tests/excavations, it is impossible to account for defects in the Phase II Pit liner. (N.T. 564)

66. It is impossible to determine whether the liner is homogeneous because of the lack of construction data. (N.T. 579-580)

67. If the liner were uniform, as documented by extensive construction tests, the testing program would be easier to design and the number of tests required would not be as numerous. (N.T. 539, 552)

68. In order to properly investigate the suitability of the Phase II Pit liner system, it is necessary to completely dismantle it. (N.T. 579)

69. Once the liner is dismantled by extensive borings and excavations, there is no way of assuring that the sealed excavations have the permeability required by the regulations, because the seal must be tested to

make such a determination, and testing will ruin the seal. (N.T. 319)

70. The only way to develop an adequate program for testing the suitability of the Phase II liner is to destroy it. (N.T. 619)

DISCUSSION

This Honorable Court's order of April 17, 1986, requires the Board to determine whether an inspection could be conducted to assess the suitability of the Phase II Pit for hazardous waste disposal under the SWMA and the rules and regulations adopted thereunder. The Commonwealth and Fiore have different views as to which regulations, and, indeed, which statute are applicable to the design of the Phase II Pit.

Although Fiore makes no definitive statement regarding the applicable law, it appears that he is suggesting that the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, the predecessor of the SWMA, and the rules and regulations adopted thereunder and still codified at 25 Pa. Code §§75.21-75.38 are applicable, since the Phase II Pit was designed in 1979. The NUS Corporation, which was retained by Fiore to design a testing program to determine the suitability of the Phase II Pit, utilized the 1979 regulatory requirements as a guideline in developing its program (Finding of Fact 37). The Commonwealth contends, on the other hand, that the requirements currently codified at 25 Pa. Code §75.264(v), which were originally promulgated at 12 Pa.B 2981 (September 4, 1982) and modified only slightly by amendments promulgated at 15 Pa.B 3289 (September 13, 1985), are the appropriate guidelines in making our determination. The issue is also complicated by the construction of the Phase II Pit without a permit, as required by both the SWMA and its predecessor statute.

This Board has consistently ruled that in the context of reviewing

the propriety of a Department permitting action, the regulations which were in effect at the time the Department took its action were applicable. Doraville Enterprises v. DER, 1980 EHB 489. As the record in this matter indicates, the Commonwealth denied Fiore's permit application for the Phase II Pit on January 4, 1985. As such, the regulations promulgated at 12 Pa.B. 2981 (September 4, 1982) were applicable. In addition, as the Department points out, federal regulations promulgated at 40 CFR §§264.301(a)(1) (47 Fed. Reg. 32305 (July 26, 1982), which were subsequently incorporated into 25 Pa. Code §75.264, were also applicable by virtue of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§6901 et seq. Fiore proceeded at his own risk in constructing the Phase II Pit without the requisite approval. He cannot have the luxury of choosing the regulatory requirements he wishes to apply to the Phase II Pit.

In reaching its determination, the Board was greatly influenced by the expert testimony proffered by the parties. As to the question of which party had the burden of proving an inspection could be conducted, we hold that Fiore had the burden. Again, because this matter originated out of a proceeding before the Commonwealth Court to enforce a consent order and agreement between Fiore and the Commonwealth, it is somewhat out of the ordinary. But, because the central issue is the technical suitability of this site for a permit, the burden of proof under 25 Pa. Code §21.101(c)(1), the Board's rules of practice and procedure, should be assigned to Fiore. We hold that Fiore has not carried that burden, but note that we would have still made a determination that the Phase II Pit could not have been inspected if the Commonwealth had been assigned the burden.

The Board has assigned more weight to the testimony of the Commonwealth's expert, Dr. David Daniel. Although Fiore characterizes the

issue as one of academic (Dr. Daniel) versus practical (NUS Corporation) experience, we believe that Dr. Daniel is eminently qualified, both from an academic and practical standpoint, to assess the issue of whether an inspection can be performed to determine the suitability of the Phase II Pit for waste disposal. Dr. Daniel's testimony on the testing of permeability of the clay liner was most significant. Certainly, the Board would be hard pressed to find a witness more knowledgeable in the area of techniques, or lack of techniques, for determining permeability of the clay liner, which is probably the overriding issue in determining the suitability of the Phase II Pit for waste disposal (Findings of Fact Nos. 55 to 58). Although Mr. Trimbath, Fiore's expert in this area, was a very credible witness, his knowledge and experience were not as extensive as that of Dr. Daniel, and his testimony supported, rather than contradicted, Dr. Daniel's testimony.

Before one even gets to the issue of testing or inspecting the Phase II Pit, it must be recognized that the Phase II Pit lacks certain elements required by 25 Pa. Code §75.264(v). More particularly, it lacks a protective cover zone/leachate collection zone as required by 25 Pa. Code §75.264(v)(3)(xiv)(E) (Finding of Fact No. 14); the sidewalls of the Phase II Pit lack a secondary liner and leachate detection zone and have slopes in excess of 20%, in violation of 25 Pa. Code §§75.264(v)(3)(xiv)(A), (B) and (C) (N.T. 424-425); the leachate detection zone is incapable of intercepting liquids and transmitting it to a collection point in violation of 25 Pa. Code §75.264(v)(3)(xiv)(C) (N.T. 525); and the subbase sits on the base of the groundwater table in violation of 25 Pa. Code §75.264(v)(3)(xiv)(A) (Finding of Fact No. 13). But most telling is the fact that the primary liner is made of clay and is incapable of preventing the migration of waste, as required by 25 Pa. Code §75.264(v)(3)(xiv)(D). Given these deficiencies in the design and

construction of the Phase II Pit, it is almost a feckless act to inspect what does exist for compliance with the remainder of the applicable regulatory requirements.

Putting these significant deficiencies aside, we find that it is not possible to perform any meaningful inspection of the Phase II Pit. It is possible to perform many scientific tests, but the real issue is not whether the tests can be performed, but, rather, whether those tests are designed to analyze the characteristics in 25 Pa. Code §75.264 (v)(3)(xiv) and, if so, whether they produce reliable and meaningful results. We find in this case that accepted scientific techniques do not yet exist to analyze the permeability of the clay liner. If the Commonwealth cannot be permitted to ignore established scientific methods in determining the existence of a violation, as in Bortz Coal v. Commonwealth, 2 Pa. Cmwlth 441, 279 A.2d 388 (1971), it follows that unrecognized scientific methods cannot be employed to demonstrate compliance with permitting requirements. The permeability of the liner is the most critical issue, as it prevents the migration of hazardous wastes into the groundwater. As Dr. Daniel pointed out, no reliable field or laboratory technique exists to determine the permeability of the clay liner and, even if the inadequate techniques are employed--e.g., double-ring infiltrometer testing, numerous tests would have to be performed because of the lack of construction data to establish uniformity of the liner. The numerous infiltrometer tests would result in numerous borings in the Phase II Pit, and there are no proven methods for either resealing the borings or testing the permeability of the seals. In essence, one would have to dismantle the existing liner in order to perform numerous tests with unrecognized techniques which yielded unreliable results. Thus, we find that it is not possible to conduct a meaningful and reliable inspection to

determine the Phase II Pit's suitability for hazardous waste disposal under the SWMA and the rules and regulations adopted thereunder.

Inasmuch as we have determined that an inspection is not possible, it is unnecessary to reach the question of whether the Commonwealth or Fiore is responsible for conducting the testing.

CONCLUSIONS OF LAW

1. The suitability of the Phase II Pit for hazardous waste disposal must be evaluated in light of the requirements of the SWMA and the current version of 25 Pa. Code §75.264.

2. Fiore has the burden of establishing that the Phase II Pit could be inspected to determine whether it is suitable for hazardous waste disposal under the requirements of 25 Pa. Code §75.264. 25 Pa. Code §21.101.

3. The Phase II Pit lacks the following components required by 25 Pa. Code §75.264 (v)(3)(xiv):

(i) a protective cover zone/leachate detection zone, and

(ii) a secondary liner and a leachate detection zone beneath the sidewalls.

4. The Phase II Pit fails to meet the following requirements of 25 Pa. Code §75.264(v)(3)(xiv):

(i) a primary liner, not made of clay, which prevents wastes from migrating into the liner during the active life of the facility,

(ii) a leachate detection zone capable of diverting any liquids within the zone to a collection point,

(iii) a secondary liner capable of diverting any leachate that may bypass the primary liner,

(iv) sidewalls having a maximum slope of 20%, and

(v) maintaining 8 feet between the top of the ground water table and

the top of the subbase without manmade means.

5. Fiore has failed to establish that his testing proposal can determine whether the Phase II Pit meets the requirements of 25 Pa. Code §75.264(v)(3)(xiv).

Respectfully submitted,

ENVIRONMENTAL HEARING BOARD.

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: July 16, 1986

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENN MARYLAND COALS, INC. :
:
V. : Docket No. 83-188-M
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: July 18, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Appellant's Motion for the Appointment of Anthony J. Mazullo, Jr. as Hearing Examiner or for De Novo Hearing is denied because the Board, in its discretion, is confident a fair and proper adjudication can be rendered from a complete review of the transcript in this case. See Lawrence Coal Company v. DER, 1983 EHB 608. See also Caldwell v. Clearfield County Children and Youth Services, 83 Pa. Cmwlth 49, 476 A.2d 996, 998 (1984).

OPINION

On July 29, 1983, the Department of Environmental Resources (Department) issued an Abatement Order directing Penn Maryland Coals, Inc. (Appellant) to provide interim and permanent treatment to five discharges of acid mine drainage from Appellant's mining operation. Appellant filed a Notice of Appeal with the Environmental Hearing Board (EHB), alleging that the discharges pre-dated its mining operation. The matter was assigned to then-Member Anthony J. Mazullo, Jr. for primary handling. Prior to the hearing on the merits, Mr. Mazullo participated in an on-site review of Penn Maryland's mining operation. Subsequent to the completion of the hearing,

Mr. Mazullo resigned from the Board without delivering an adjudication. Apparently, after his resignation, Mr. Mazullo initiated discussions with counsel for the Appellant indicating his willingness to be appointed and serve as an "outside" hearing examiner for the purpose of preparing a proposed adjudication of this matter pursuant to the Board's Rule of Practice and Procedure, §21.86(a). Appellant now moves for the appointment of Anthony J. Mazullo, Jr. as hearing examiner.

Appellant argues its due process rights will be violated if the Board adjudicates this case solely on the basis of a "cold" record. Since only former-Board member Mazullo was able to assess the demeanor of the witnesses at the hearing, Appellant asserts that Mr. Mazullo should be appointed hearing examiner for purposes of issuing the adjudication.

The Environmental Hearing Board has previously held that resignation of a Board member precludes that member from playing any role in the adjudication of docketed cases. Lawrence Coal Company v. DER, 1983 EHB 608. Any comments, recommendations, or discussions between former Board members and current litigants are "irrelevant." Id. Accordingly, Mr. Mazullo's alleged statements of willingness to serve as an "outside" hearing examiner in this can have no binding authority upon this Board. Id.

> Rule of Practice §21.86(a) states in part. . .
> [h]earings may be held, at the Board's discretion, before the Board as a whole, by individual Board members sitting as hearing examiners, or by hearing examiners who are not members of the Board. Hearings held by hearing examiners not members of the Board will be decided by the Board based upon its review of the record and the examiner's proposed adjudication (emphasis added).

Rule 21.86(a) unequivocally grants the Board complete discretion when assigning matters for hearing. See Lawrence Coal Company v. DER, 1983 EHB 608. Counsel cannot suggest to the Board that a particular individual be

appointed as a hearing examiner, no matter how well-intentioned the request, as the appointment of examiners is an internal matter for the Board.

The situation presently before the Board is distinguishable from the special master proceeding cases cited by Appellant. Special masters are often appointed to assist the court in developing the factual record in highly technical law suits. Upon presiding at the proceedings, the special master generally cannot be denied participation in the adjudication of the law suit. Former Board Member Mazullo, however, never served as a special master in this case. Mr. Mazullo's authority to adjudicate controversies was incident to his membership on the Board. It was Mr. Mazullo's decision to leave the Board. Any outstanding caseload left behind by Mr. Mazullo must be reassigned to the current Board members; if matters were ripe for adjudication, the Board, as a whole, will prepare an adjudication in accordance with 1 Pa. Code §35.203. Only at the Board's discretion will "outside" hearing examiners be appointed to assist the Board by preparing recommendations regarding proposed adjudications.

Appellant's constitutional concerns, however, should not be summarily dismissed. In some proceedings, observance of the demeanor of witnesses by the factfinder is critical to a fair trial. It is well established, however, "while witness demeanor is an important consideration in determining credibility, it is not the only consideration, and administrative adjudications are not precluded from determining the credibility of testimony from the reading of a transcript." Caldwell v. Clearfield County Children and Youth Services, 83 Pa. Cmwlth 49, 476 A.2d 996, 998 (1984). See also United States Steel Corporation v. DER, 7 Pa. Cmwlth 429, 300 A.2d 508 (1973); Fleming v. State Civil Service Commission, 13 Pa. Cmwlth 421, 319 A.2d 185 (1974); Siegel v. State Civil Service Commission, 9 Pa. Cmwlth 256, 305 A.2d 736 (1973).

From a review of the record in this case, the Board is confident all demonstrative evidence and witness credibility evidence can be adequately gleaned from the transcript by the existing Board members. Accordingly, Appellant's Motion for Appointment of a Hearing Examiner or a trial de novo is denied.

In an attempt to eliminate any prejudice to Appellant which may result from this order, the Board will entertain motions by Appellant for oral argument and on-site viewing of the mining operation in question. Appellant must file such motions within twenty (20) days of the date of this Order.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that Appellant's Motion for Appointment of a Hearing Examiner or De Novo Hearing is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation

For the Commonwealth:
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For the Appellant:
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DATED: July 18, 1986

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M. DIANE SMITH
SECRETARY TO THE BOARD

DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY	:	
V.	:	**Docket No. 81-116-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 18, 1986

OPINION AND ORDER

Synopsis

An appeal is dismissed where there has been no activity at the docket for an extended period of time and Appellant has failed to comply with a Board order.

OPINION

This matter was initiated on July 30, 1981, by the filing of a Notice of Appeal by the Delaware County Regional Water Quality Control Authority, which is commonly known as DELCORA. The appeal sought review of certain terms and conditions in a National Pollutant Discharge Elimination System (NPDES) permit issued to DELCORA by the Department of Environmental Resources (Department) and was accompanied by a Petition for Supersedeas.

A supersedeas hearing was held on August 20, 1981, and, based upon an agreement of counsel, an order granting a supersedeas, subject to certain conditions, was issued by the Board on September 10, 1981. The supersedeas order was to "continue in full force and effect, until at least November 1, 1981, and thereafter for a reasonable time, or until such time as the parties

request a hearing." Over three years later, the Board requested a status report from the parties. After the issuance of a letter advising DELCORA and the Department that they were in default of the Board's November 13, 1984, request for a status report, DELCORA informed the Board on December 10, 1984, that the parties were still negotiating the conditions of the appealed permit.

DELCORA advised the Board on July 3, 1985, in response to a June 25, 1985, request for a status report, that "negotiations are continuing and very nearly concluded." The Board again requested a status report in an order dated October 30, 1985, and was informed by DELCORA on November 4, 1985, that the matter was resolved and the appeal would be withdrawn as soon as an amended NPDES permit was issued. The Department confirmed the settlement in a letter filed on November 15, 1985, and requested a general continuance, "pending the issuance, probably in the next six months, of the new NPDES permit and the subsequent withdrawal of the appeal." Such a continuance was granted by order dated November 18, 1985.

After six months had passed, with no activity at the docket, the Board issued an order on May 13, 1986, allowing the parties to June 11, 1986 to complete settlement negotiations and requiring the filing of a status report accompanied by a request for appropriate Board action on June 18, 1986. The order also stated that if no activity at the docket occurs by July 2, 1986, the matter was subject to being dismissed for inactivity. As of the date of this opinion, the Board has received no communication from either party.

The Board has recently held in Glah Brothers, Inc. and FSI Corporation v. DER, EHB Docket No. 82-026-M (opinion and order issued June 18, 1986) and Springbrook Township v. DER, EHB Docket No. 84-122-M (opinion and order issued May 8, 1986) that appellants are under an obligation to diligently prosecute their appeals. The Board will not hold matters on its docket in

abeyance for years upon assurances from the parties that negotiations are occurring and settlement is imminent. Since neither party has filed a status report, we can only speculate why this matter has not been concluded. But, we will speculate no more, as we believe that nearly five years is a more than ample time to conclude this matter.

ORDER

AND NOW, this 18th day of July, 1986, it is ordered that the appeal of Delaware County Regional Water Quality Control Authority docketed at 81-116-M is dismissed pursuant to 25 Pa. Code §21.124 for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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DATED: July 18, 1986

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M. DIANE SMITH
SECRETARY TO THE BOARD

LOWER ALLEN CITIZENS ACTION GROUP, INC., Appellant	:	
v.	:	**EHB Docket No. 86-246-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 18, 1986
and	:	
HEMPT BROS, INC., Permittee, Appellees	:	

OPINION AND ORDER

Synopsis:

Judgment on Appellee's Motion to Dismiss for untimely filing of a notice of appeal is deferred pending receipt of evidence relating to receipt of notice of the Department of Environmental Resources' action.

OPINION

On March 18, 1986, the Department of Environmental Resources (Department) approved an amendment to a permit authorizing the operation of a limestone quarry owned by Hempt Bros., Inc. (Permittee) in Lower Allen Township, Cumberland County. Permittee alleges that some form of notice of this action was mailed on March 20, 1986 to the Lower Allen Citizens Action Group, Inc. (Appellant) and that it was received by Appellant before April 14, 1986. Notice of the issuance of the permit amendment was also published in the Pennsylvania Bulletin at 16 Pa. Bulletin 1200 (April 5, 1986). On May 5, 1986, Appellant filed a Notice of Appeal with the Board challenging the issu-

ance of the permit amendment. Permittee filed a motion to quash to appeal as being untimely filed.

The Board has jurisdiction over timely filed appeals. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761, 763 (1976). The rule governing timely filed appeals is found at 25 Pa.Code §21.52(a), which states

> . . .jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin. . . 25 Pa.Code §21.52(a)

The Board has interpreted Rule 21.52 as providing two independent bases for determining the timeliness of a notice of appeal. Consolidation Coal Company v. DER and J & D Mining, Inc., 1983 EHB 339. The 30 day filing period commences by either the receipt of a written notice of Departmental action by a party appellant or by publication of a notice of such action in the Pennsylvania Bulletin. Id. Section 1903 of the Statutory Construction Act, 1 Pa.C.S. §1903 requires the word "or", as employed in Rule 21.52, be given its common meaning, thereby establishing two disjunctive alternatives for computing the 30 day filing period. See Consolidation Coal Company v. DER and J & D Mining, Inc., 1983 EHB 339.

In the situation where both notice to a party appellant and publication of notice are present, the tolling of the 30 day filing period will commence by the occurrence of the earlier event. Id. Such a situation may exist in the case at issue, but a judgment as to the timeliness of the notice of appeal, however, cannot be rendered by the Board at this time because the Permittee has failed to submit any evidence, other than its own statement, that Appellant received notice of the Department's action prior to April 14,

1986. The Board, therefore, defers judgment on Permittee's Motion to Dismiss until further evidence is submitted to the Board relating to the date Appellant received notice of the Department's issuance of the permit. If such evidence is not or cannot be produced, Permittee's Motion to Dismiss will be denied.

ORDER

AND NOW, this 18th day of July, 1986, it is ordered that Permittee shall submit to the Board on or before August 7, 1986 additional evidence relating to the date of receipt of notice of the Department's action by the Appellant. A ruling on Permittee's Motion to Dismiss is deferred until that date.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 18, 1986

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bl

BRDARIC EXCAVATING, INC.	:	
	:	
	:	
V.	:	**Docket No. 85-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 22, 1986
	:	

OPINION AND ORDER

Synopsis

An Opinion and Order imposing sanctions on an Appellant for failure to meet discovery deadlines is an interlocutory order. The Board will not grant a motion for reconsideration of interlocutory orders save in the most exceptional cases.

OPINION

The above-captioned appeal was filed May 17, 1985, by Brdaric Excavating, Inc. (Appellant). Appellant is appealing the Department of Environmental Resources (DER) denial of a permit for a Class III Demolition Waste Disposal Site at the Bunker Hill Landfill, Kingston Township, Luzerne County. The Board here rules on Appellant's Motion for Reconsideration of the Board's Opinion and Order in this appeal issued June 24, 1986. Said Order imposed sanctions against Appellant for failure to obey discovery rules. Appellant filed the motion for reconsideration on July 9, 1986. On July 11, 1986, DER filed its response to said motion.

The Board will not replicate its discussion and reasoning contained in its Opinion and Order of June 24, 1986. But to state that order simply, it is the Board, upon a motion of a party, which decides when a deadline

extension will be granted and Appellant failed to request one from the Board, thus sanctions were imposed. Nothing in Appellant's present motion indicates in any way that the Board's order was incorrect.

Further, petitions for reconsideration of Board decisions are dealt with in 25 Pa. Code §21.122. Appellant here seeks reconsideration of an interlocutory order. The Board has repeatedly interpreted §21.122 to hold that, except in the most exceptional cases, it will not reconsider interlocutory orders. John F. Culp III v. DER, 1984 EHB 611, Chemical Waste Management, Inc. et al. v. DER, 1982 EHB 482. The main justification put forth in Appellant's motion is that Appellant's present attorney has had difficulty in obtaining files and other information from the attorney who originally filed this appeal for Appellant. The Board finds this argument unpersuasive. The Board's own records are always open to public inspection. In addition, Appellant has the responsibility of timely obtaining the requisite information to prosecute its appeal.

ORDER

AND NOW, this 22nd day of July, 1986, Appellant's Motion for Reconsideration of the Board's Opinion and Order in this appeal dated June 24, 1986, is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation

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For the Commonwealth:
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DATED: July 22, 1986

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CONSOLIDATION COAL :
:
V. : Docket No. 85-220-G
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: July 23, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and GEORGE ENTERPRISES, INC. and
INTERSTATE DRILLING, INC., Permittees

OPINION AND ORDER

Synopsis

On the reasoning of our earlier Opinion in this matter (June 11, 1986 at this docket number), the sole remaining undismissed portion of this appeal, concerning DER's refusal to act on Consolidation's request respecting George's so-called well 4, now also is dismissed. Consolidation has not put any facts on the record which would justify the finding that George's activities at well 4 before May 2, 1985 (the date of DER's letter to Consolidation refusing Consolidation's request that DER take action against George) had violated applicable law. Without such a finding, DER lacked authority to take action against George, the holder of the permit for drilling gas well 4, even if (as Consolidation insists) the well 4 permit had lapsed by operation of law on April 18, 1985.

OPINION

The history of this appeal has been described in three Opinions and Orders at the above-captioned Docket number (issued September 18, 1985, December 20, 1985 and June 11, 1986), to which the reader should refer for

full details of this history. Very briefly, Consolidation Coal ("Consol") has appealed DER's refusal (in a letter to Consol dated May 2, 1985) "to take whatever action is necessary to prevent the unauthorized drilling" of three gas wells which have been identified as George Wells 1, 2 and 4. Our June 11, 1986 Opinion and Order granted summary judgment for DER as to wells 1 and 2. The Board ruled that, as a matter of law, DER's refusal to take the action Consol requested relative to wells 1 and 2 was not an abuse of DER's discretion, because--as of May 2, 1985--there were no facts available to DER which would justify DER's issuance of the order Consol requested, namely an order to George to cease drilling activities at wells 1 and 2 and/or to surrender George's permits for drilling those wells. Therefore the Board dismissed that portion of the above-captioned appeal which pertains to wells 1 and 2.

DER now has moved for dismissal of this appeal as to well 4, the only remaining portion of this appeal; thus DER in effect has moved that the entire appeal be dismissed. DER's grounds for requesting dismissal are that for well 4, like wells 1 and 2, there were no facts available to DER--as of May 2, 1985--which would justify issuance of the order Consol requested. Consol's response to DER's motion does not point specifically to any actions by George before May 2, 1985 which could have justified issuance of Consol's requested order. Consol's response does state that "the record indicates that grading and site enlarging activities occurred at said site [the site of well 4] sometime shortly before May 16, 1985, which could have occurred within the time period in question [after April 18, 1985 but before May 2, 1985];" evidence this weak, however, is insufficient to meet Consol's burden--of showing that DER's May 2, 1985 letter was an abuse of DER's discretion with respect to well 4 because before May 2, 1985 George had

violated applicable law at the well 4 site. Moreover, George's and Interstate's answers to Consol's Interrogatory No. 18 to those intervenors states that between March 1985 and June 1985 there was no activity at the site for well 4. Insofar as well 4 is concerned, all evidence that Consol wished to put on the record has been heard, except for survey evidence relating to the locations of drilling activities but not to the times those activities occurred (transcript of March 5, 1986 telephone conference call, p. 42).

Therefore, whether we treat DER's motion to dismiss the portion of this appeal pertaining to well 4 as a motion for summary judgment (as we did treat DER's motion to dismiss with respect to wells 1 and 2, for reasons explained in our June 11, 1986 Opinion and Order), or whether we merely treat DER's motion as a request that we promptly render a final adjudication of the appeal, we have to conclude that the appeal must be dismissed with respect to well 4. For this conclusion we need only the following Finding of Fact, which the record amply supports, namely: There is no evidence that George's activities at the well 4 site before May 2, 1985 were in violation of applicable law. On this Finding, and the controlling reasoning of our June 11, 1986 Opinion and Order, we cannot avoid the Conclusion of Law that: As of May 2, 1985, DER had no facts available to it which could justify an order to George to cease drilling activities at well 4 and/or to surrender George's permit for drilling well 4.

The foregoing Conclusion of Law immediately implies, again following the reasoning of our June 11, 1986 Opinion and Order, that DER's appealed-from refusal to act on George's request respecting well 4 was not an abuse of DER's discretion. The portion of this appeal respecting well 4 must be dismissed. Since this now is the only remaining portion of this appeal, the entire appeal must be dismissed.

ORDER

WHEREFORE, this 23rd day of July , 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Zelda Curtiss, Esq./Eastern

For Appellant:
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Pittsburgh, PA

For Intervenors
Patrick C. McGinley, Esq.
Morgantown, WV

DATED: July 23, 1986

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M. DIANE SMITH
SECRETARY TO THE BOARD

DORAN & ASSOCIATES, INC. :
:
:
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V. : Docket No. 86-166-G
: Issued: July 23, 1986
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Doran has appealed a letter from DER's counsel to Doran's counsel, suggesting terms for settlement of a previous dispute between the parties. Such a letter is not an appealable action of the Department. Also, under the Commonwealth Attorneys Act, 71 P.S. §732-101 et seq., DER's counsel is not empowered to assess penalties against Doran. Therefore the appeal is dismissed.

OPINION

Doran has appealed a DER letter dated February 21, 1986. On April 23, 1986 DER filed a motion to dismiss this appeal, as having been taken from an unappealable action. The Board's Pre-Hearing Order No. 2 advised the parties that responses to an opposing party's motion are due within 20 days. On May 19, 1986, somewhat after the 20 day deadline for response to DER's April 23, 1986 motion had passed, Doran requested an extension of time until June 16, 1986 to respond to the motion. The Board granted the request. Nevertheless, as of this date, Doran has not filed its response to DER's motion, nor has it

asked for another extension. Therefore we have ruled on DER's motion, and have decided to grant it, for reasons which follow:

DER's letter was written by DER's Assistant Counsel Zelda Curtiss, and was addressed to Doran's counsel. The letter's full text is as follows:

> At a meeting with your client on October 9, 1985, we agreed to defer resolution of the outstanding violation at the Ross Kent Well 1 until a later date. This letter is to set forth conceptually the corrective actions required at the site and proposed penalties under both the Dam Safety and Encroachments Act and the Oil and Gas Act.
>
> Had Doran and Associates applied for a permit to fill the wetland prior to filling the wetland, the Department would have denied the permit. Therefore, in designing corrective actions, our aim is to mitigate the effects of the fill and to avoid potential pollutional impacts because of Doran's activities in the wetland. We propose that Doran remove all fill except for a 17-foot access road to the well site. The existing pit must be pumped out and the pit contents disposed of in a lawful manner. Any remaining plastic liner should be removed from the site. Any pipeline(s) necessary for oil and/or brine transmission must be located within the 17-foot access road. The tank battery should be located on dry land. Upon completion of corrective activities, only the well and the access road should remain in the wetland. The details of removal of the fill, such as use of filter fabric, can be discussed at a later date. I would envision requirements similar to the ones in the Consent Order and Agreement we executed to resolve the other violations.
>
> The proposed penalty for violation of the Dam Safety and Encroachments Act is $15,000.00 and for violation of the Oil and Gas Act is $2,500.00. As I mentioned to you in our phone conversation Wednesday afternoon, the actual calculation for the violation under the Dam Safety and Encroachments Act is greatly in excess of the proposed penalty. The proposed penalty of $15,000.00 is offered to expeditiously resolve this matter. However, any penalty for future violations of filling in a wetland without a permit will be assessed using penalty calculations being implemented by the Bureau.
>
> This letter is meant only to summarize the Department's position and may not include all the specifics which may be included in a formal settlement document.
>
> I ~~genuinely~~ hope your client finds the Department's position ~~acceptable so we may~~ quickly resolve this dispute and issue Doran a permit.
>
> Please call me if you have any questions or to set up a meeting.

Doran has termed the above letter a "Notice of Penalties." DER contends that the letter merely is an offer of settlement, and therefore not appealable. Amerikohl Mining, Inc. v. DER, EHB Docket No. 85-090-W (Opinion and Order, January 7, 1986). On the letter's face, especially in the absence of countervailing arguments from Doran, we see no way to avoid agreeing with DER's contention. DER also contends, and we also agree, that the letter cannot be a "Notice of Penalties" because under the Commonwealth Attorneys Act, 71 P.S. §732-101 et seq., DER's Assistant Counsel Curtiss did not have the authority to impose penalties on Doran. George Enterprises, Inc. v. DER, Docket No. 85-291-G (Opinion and Order, December 19, 1985).

ORDER

WHEREFORE, this 23rd day of July , 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Stanley R. Geary, Esq./For Appellant
Zelda Curtiss, Esq./DER Western

DATED: July 23, 1986

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NORTH CAMBRIA FUEL :
:
:
V. : Docket No. 85-297-G
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: July 25, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

The appellant, who has been ordered to abate discharges allegedly caused by its surface mining operations, believes these discharges have been caused by mining operations on property bordering appellant's mining site. The appellant therefore has filed a motion to compel DER to allow the appellant entry onto this neighboring property, for the purpose of inspection and testing consistent with the discovery rules of the Pennsylvania Rules of Civil Procedure, notably Rule 4009(a)(2). The neighboring property owner and/or occupier is not a party to this appeal, and cannot be joined as a party under the Board's rules. Thus a notice of proposed discovery under Rule 4009 cannot be served directly on the neighboring property owner. The appellant claims, however, that the "control" DER needs to authorize entry onto the non-party's property under Rule 4009(a)(2) has accrued to DER under the terms of the so-called Supplemental C form signed by the owner of the neighboring property; this Supplemental C form grants DER or "its authorized agents" the right of entry the appellant seeks. The Board rules that the motion to compel must be rejected because the appellant is not DER's authorized agent;

an essential element in the relationship between agent and principal is the principal's consent (which DER refuses to give) that the would-be agent appellant act for DER in its entry onto the neighboring land. However, the Board finds it difficult to understand why DER has not been cooperative in the appellant's attempt to obtain its proposed discovery. Therefore the Board reserves the right to draw inferences unfavorable to DER's theory that appellant is responsible for the offending discharges, if it is shown that DER, without good reason, has been unwilling to cooperate in the appellant's attempt to perform discovery on its neighbor's property.

OPINION

On June 28, 1985, North Cambria Fuel ("NCF") appealed a DER order requiring NCF to treat a number of discharges allegedly emanating from NCF's surface mining operation under Mine Drainage Permit No. 32810135, permitting NCF to operate its Dietrich surface coal mine in West Wheatfield Township, Indiana County. This appeal was docketed at the above-captioned docket number. NCF requested a supersedeas of this order, which was denied after a hearing (NCF v. DER, Opinion and Order at the above-captioned docket number, September 13, 1985). On January 17, 1986 DER issued a compliance order to NCF concerning a discharge from a treatment pond at the Dietrich mine site, which order also was appealed by NCF, under Docket No. 86-105-G. On February 28, 1986, this second appeal was consolidated with the first appeal, under the above-captioned 1985 docket number.

NCF's pre-hearing memorandum claims, inter alia, that NCF's mining operations have not caused the alleged water quality degradation of the discharges forming the subject of DER's appealed-from orders. On April 10, 1986, shortly before the previously scheduled May 5-9, 1986 hearing on the merits of the appeal, NCF filed a motion asking the Board to

> issue an order granting it the right to enter upon property of Bentley Coal Company and Blairsville Associates located to the south and west of the property known as the Dietrich mine for the purposes of drilling certain monitoring wells and securing certain water data for use in this appeal.

NCF's stated reason for this request was its belief that the data so obtained would show that the degradation of the aforesaid discharges was caused by groundwater entering the Dietrich mine site from neighboring properties, i.e., was not caused by NCF's mining operations.

This request was denied by the Board on April 10, 1986, the very same day it was received. The Board's order denying the request stated in pertinent part:

> [A]ppellant's Motion for an order compelling Bentley Coal Company and Blairsville Associates to permit appellant entry onto land owned and/or controlled by those entities is denied. The Board lacks the authority to grant the requested relief. Pursuant to Pennsylvania Rule of Civil Procedure 4009, requests to permit entry onto land may be served upon other parties to a proceeding. Bentley Coal and Blairsville Associates are not parties to the above-captioned matter.

On April 28, 1986, however, NCF filed another motion which rephrased its request for a right of entry onto the Blairsville/Bentley ("B/B") property. This revised motion no longer requests the Board to compel B/B to allow NCF entry onto the B/B property. Instead, NCF now is requesting the Board to compel DER to allow NCF entry on the B/B property, on the claimed basis that DER is "in possession or control" [the language of Pa. Rules of Civil Procedure Rule 4009(a)(2)] of the B/B property for the purposes of the inspecting and testing NCF proposes to perform.

By April 28, 1986, NCF had not formally requested DER to authorize NCF's entry onto the B/B property for the purposes of Rule 4009(a)(2) discovery, so that as of April 28, 1986 the Board had no reason to issue an

order to DER compelling compliance with NCF's request. The necessary formal request was filed May 8, 1986, however, and has been refused by DER. The question of DER's authority to allow NCF entry onto B/B's property was the subject of argument between counsel for DER and NCF during the May 5-9, 1986, hearings on the merits,[1] and both parties now have filed memoranda of law on the subject. The hearing on the merits was not completed on May 9, 1986, and is scheduled to resume December 8, 1986, when NCF will present its case. NCF, believing the tests it proposes to perform on the B/B property will take some time, understandably has urged the Board to render a prompt ruling on NCF's discovery request; a letter from NCF to the Board, dated June 16, 1986, has made explicit this desire of NCF's for a prompt ruling. B/B has not petitioned to intervene in this matter, in order that it might make its own objections to NCF's request, although DER, at the Board's suggestion, has notified B/B of NCF's request;[2] indeed, the Board has received no communication whatsoever from B/B since the filing of this appeal. We conclude that this discovery request of NCF's is ripe for adjudication, and that there is no reason to wait any longer for B/B to present its views on the issue at hand. Therefore, we now will rule on NCF's pending motion to compel.

The Requirement of Agency

Under the Board's rules and regulations, "requests for entry for inspection or other purposes shall be governed by Rule 4009 of The Pennsylvania Rules of Civil Procedure." 25 Pa. Code §21.111(d). The pertinent subsection of Rule 4009 reads:

---

1 See May 5 transcript, pp. 4-29 and May 6 transcript, pp. 331-341.

2 On July 11, 1986 DER sent the Board a copy of a May 21, 1986 letter from DER to B/B, informing B/B of NCF's request.

> (a) Any party may serve on any other party a request
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rules 4003.1 through 4003.5 inclusive.

Evidently under Rule 4009(a)(2), the propriety of NCF's discovery requests depends entirely on whether the B/B property NCF wishes to enter is "in the possession or control" of DER for the purposes of NCF's proposed inspection and tests. NCF strongly argues, and DER equally strongly denies, that the requisite "possession or control" is implied by the terms of the landowner consent form (the so-called Supplemental C) executed on May 26, 1982 by William Stefan, who owns the land on which NCF seeks entry; this landowner consent form was executed in connection with B/B's application for a mine drainage permit authorizing B/B to conduct surface mining operations on Mr. Stefan's land. This consent form has been made part of the record in this appeal, as DER Exhibit 1 at the hearing on the merits. It states:

> We the undersigned, the owners of land located in Burrell Township, Indiana County, upon which Blairsville Associates is to conduct a surface mining operation for which an application for permit is being made and of which application this instrument of consent is made a part, do hereby grant irrevocably to the operator named above, his heirs, executors, administrators, successors, transferees and assigns the right to enter upon the land for the purposes of conducting surface mining operations Furthermore, we do hereby irrevocably grant to the operator, his heirs, executors, administrators, successors, transferees, assigns and the Commonwealth of Pennsylvania or any of its authorized agents, the right to enter upon the aforesaid land during the mine operation and for a period of five (5) years after the termination, completion, or abandonment of the surface mining operation for the purposes of inspection, studying, backfilling, planting, reclaiming and abating pollution in accordance with the provisions of the Surface Mining Conservation & Reclamation Act of May 31, 1945, P.L. 1198, as amended.

NCF is not claiming that this Supplemental C form gives DER "possession" of the B/B mine drainage permit area (henceforth the "B/B site") under any commonly accepted definition of "possession." Certainly, there is nothing in the record to indicate that DER has received a deed or other overt indication of a possessory interest in the B/B site. The legal description of the interest conveyed to DER by the Supplemental C is not wholly clear, but this interest appears to be either an easement or a license, or perhaps both of these simultaneously. Under Pennsylvania law, these interests affecting real property do not involve an interest in the land itself or a right to any part of the land, i.e., they are not interests of the sort normally termed "possession." P.L.E. Easements §1; P.L.E.Licenses, §24.

Thus NCF must be arguing that the Supplemental C form gives DER the "control" of the B/B property required to authorize discovery by NCF under Rule 4009(a)(2). We do not agree with this contention, however. The Supplemental C form empowers DER or any of its authorized agents, but no one else, to enter onto Mr. Stefan's land. Consequently DER can authorize NCF's entry for NCF's desired discovery purposes, i.e., DER has the requisite Rule 4009(a)(2) "control" to authorize NCF's entry onto B/B's property, only if NCF can be regarded as an authorized agent of DER's. If NCF is not DER's "authorized agent" (as the parties signing the Supplemental C form understood the meaning of that term), Mr. Stefan and B/B have not waived their rights to bar NCF from the B/B property.

The Supplemental C form does not define the meaning of "authorized agent," and we know of no case law construing "authorized agent" as employed in the Supplemental C. Therefore, in accordance with established contract law precepts, we have little choice but to give the term its plain meaning under standard Pennsylvania agency law usage. But under Pennsylvania law, an

essential element in the relationship between principal and agent is the principal's consent to having the agent act for the principal in some specified regard. P.L.E. Agency §1. The consent need not be explicit; it can be inferred from the conduct of the parties. Pirilla v. Bonucci, 467 A.2d 821 (Pa. Super. 1983). The law is clear, however, that without some manifestation by the principal that an agency relationship is intended, an agency relationship does not exist. Pirilla, supra; Bradney v. Sakelson, 473 A.2d 189 (Pa. Super. 1984).

DER has not manifested any desire to have NCF act for DER when and if NCF enters onto B/B's property; rather DER's memorandum of law makes it manifest that DER does not regard, and has no intention of regarding, NCF as DER's agent for any purpose whatsoever, whether or not the Board orders DER to allow NCF on B/B's property. We conclude that NCF should not be regarded as DER's agent under the Supplemental C, even if DER--in obedience to the Board's order--were to allow NCF to enter onto the B/B property for NCF's proposed discovery purposes.

In short, the necessary agency relationships between NCF and DER does not exist, and shows no sign of coming into existence in the near future as a result of any voluntary action by DER. We see no authority for our ordering DER to make NCF its agent. Accordingly, we cannot find that the present or immediate future "control" over B/B's property afforded DER by the executed Supplemental C extends sufficiently far to satisfy the requirements of Rule 4009. Consequently we must reject NCF's April 28, 1986 motion. As matters presently stand, with DER unwilling to regard NCF as its agent, the inspection and testing NCF proposes to perform must be arranged, if they can be arranged at all, by private agreement between NCF and B/B, or under the authority of another tribunal with less restricted powers than this Board.

Should DER Make NCF Its Agent?

The foregoing does not conclude our discussion, however, If B/B were a party to this appeal, NCF would have the right to serve its discovery request directly on B/B without attempting to use DER as an intermediary via the Supplemental C form; moreover, the Board can see no reason why such a discovery request on a party B/B would not be perfectly reasonable under Rule 4009(a)(2). Furthermore, if the Board's rules permitted joinder (e.g., under some analogue of Pa. Rules of Civil Procedure Rule 2252), NCF would have been able to make B/B a party, and thereby could have ensured its right to perform its proposed discovery.

In sum, NCF's inability to perform its desired discovery stems entirely from the happenstance that this Board's rules and regulations, 25 Pa. Code Chapter 21, make no provision for joinder of additional parties, even where such joinder appears to be in the interests of facilitating a just resolution of a dispute, as does appear to be the case in the instant circumstances. The evidence already on the record in this appeal shows that at least one of the discharges NCF has been ordered to treat is located very close to the boundary between NCF's and B/B's properties. It is reasonable for NCF to postulate--and to seek to ascertain--that the degradation of those discharges is caused by groundwater entering the Dietrich mine from B/B's property. It is unfortunate--and unfair for NCF--that our rules do not permit NCF to attempt to establish NCF's theory of the origin of the discharges, via the routine discovery that would be permissible in other fora, e.g., Common Pleas Court. It is equally unfortunate and unfair to NCF that DER has not been willing to cooperate with NCF in NCF's attempt to secure the discovery which NCF would be able to obtain routinely in other fora.

This last assertion of ours deserves elaboration. DER--once it has made its decision about who is responsible for a discharge and has issued an appropriate abatement order--does not have the obligation to perform any tests the recipient of that abatement order proposes. Such an obligation would severely and altogether unwisely strain DER's resources. DER's burden in the present appeal is no less, but also no more, than to persuade the Board that DER has not abused its discretion in ordering NCF to abate the aforesaid discharges; assuredly it is not DER's burden to disprove each and every one of NCF's theories about the causes of degradation in those discharges. W. P. Stahlman v. DER, Docket No. 83-301-G (Adjudication, April 29, 1985). If there are tests which DER deems unnecessary, but which NCF believes will cast doubt on DER's theory of the case, then it is up to NCF to perform those tests.

In the instant appeal, NCF is not asking DER to expend DER's resources on tests which DER deems unnecessary; NCF is willing to perform those tests itself, at its own expense. But NCF cannot perform the tests without DER's cooperation; in particular, it is necessary that DER assert sufficient sponsorship and supervision of the tests to satisfy the Supplemental C requirement that NCF be DER's agent in performing the tests. We believe this cooperation from DER should be forthcoming; DER, which the legislature has entrusted with important, often severe, enforcement powers, should welcome the opportunity to secure--at no expense to DER--additional data possibly pertinent to the causes of degradation in discharges whose abatement DER has ordered.

In writing the preceding paragraph, we recognize that DER does have problems in cooperating with NCF, presently its adversary in the instant appeal. Moreover, DER has obligations to B/B and Mr. Stefan; when the

Supplemental C was signed, it certainly was not in the contemplation of the parties that DER would casually allow anyone who requested entry onto the B/B property to do so as an agent of DER's. But in the context of the instant appeal we see no reason why difficulties of this sort cannot be overcome. NCF should not be permitted to harass B/B, or to interfere unduly with B/B's activities, and NCF reasonably might be required to put up a bond to ensure that any damage to B/B's property will be compensated. Perhaps the proposed tests should be performed only by a consulting engineering firm approved by DER, with the results furnished simultaneously to NCF and DER. Assuming NCF is willing to accept reasonable restrictions of this kind, however, we cannot understand why DER should not be willing to authorize NCF's entry onto B/B's property as DER's agent for the performance of NCF's proposed tests. After all, DER has conceded that under the Supplemental C DER itself could enter the B/B property to perform the very tests NCF proposes (May 5 transcript, pp. 22-23).

Conclusion

To sum up our discussion, although we have no legal basis for granting NCF's April 28, 1986 motion to compel discovery, we do not understand DER's unwillingness to cooperate with NCF in attempts to make that discovery possible under the powers granted DER by B/B's Supplemental C. B/B's motion asks us--if we will not compel NCF's requested discovery--to draw the inference that DER's unwillingness to cooperate in NCF's attempt to perform discovery on B/B's property suggests such discovery would produce data which are unfavorable to DER's theory that NCF is responsible for the ~~aforesaid~~ discharges. We believe this NCF request is not unreasonable; we will not grant it at this juncture, without having heard all the evidence to be presented, but we will keep the request in mind. Moreover, we will permit

NCF to present--and DER to rebut of course--evidence that DER has been unwilling to cooperate with NCF in finding a way to authorize NCF's discovery under the Supplemental C form and Rule 4009(a)(2); for the reason stated immediately supra, such evidence now appears to be relevant to this appeal. Finally, we explicitly reject NCF's arguments, in its supplemental memorandum in support of its motion, that DER has the requisite Rule 4009(a)(2) control over B/B's property by virtue of various sections of the Clean Streams Law, 35 P.S. §691.1 et seq. ("CSL"). As DER correctly argues, these CSL sections conferring enforcement powers on DER cannot be stretched to confer those same powers on NCF, unless DER wishes to make NCF its agent for the purposes of those enforcement powers. Thus the CSL issue raised by NCF must be resolved along the very same lines already thoroughly discussed, namely that unless DER is willing to designate NCF as its agent, Rule 4009(a)(2) inspection and discovery cannot be compelled.

ORDER

WHEREFORE, this 25th day of July, 1986, it is ordered that:

1. NCF's April 28, 1986 motion to compel discovery is rejected.

2. Evidence relevant to DER's cooperation or lack of cooperation in NCF's attempt to perform discovery on B/B's property will be admissible at the renewed hearings on the merits of this appeal.

3. The Board reserves the right to draw inferences favorable to DER's theory of NCF's responsibility for the discharges which are the subject

of this appeal, if it is shown that DER, withoug good reason, has been unwilling to cooperate in NCF's attempt to perform its proposed discovery on B/B's property.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Appellant:

Beverly A. Gazza, Esq.
MACK & BONYA
Indiana, PA

For the Commonwealth:

Michael Arch, Esq.
Western Region

DATED: July 25, 1986

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EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCONIA TOWNSHIP	:	
	:	
	:	
V.	:	Docket No. 85-083-M
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and HIRAM HERSHEY, Intervenor	:	Issued: July 25, 1986

OPINION AND ORDER

Syllabus

Where parties fail to file answering pre-hearing memoranda and fail to respond to repeated notices of default, the Board will impose sanctions pursuant to 25 Pa. Code §21.124.

OPINION

The above-captioned appeal concerns the appeal of Franconia Township (Appellant) of a Department of Environmental Resources (DER) order to Appellant to revise its Official Sewage Facilities Plan. Developer Hiram Hershey (Intervenor), in order to provide adequate sewage facilities for his Pear Tree Village development, requested Appellant to revise its Official Plan and Appellant refused. On August 7, 1982, Intervenor requested DER, pursuant to the Sewage Facilities Act 35 P.S. §750.5 and 25 Pa. Code §71.17, to order Appellant to revise its plan to provide for the development. On February 22, 1985, DER issued the order to Appellant to revise its Official Plan.

On March 21, 1985, Appellant filed the above-captioned appeal. The

Board's Pre-Hearing Order No. 1 was issued on March 22, 1985, ordering Appellant to file its pre-hearing memorandum on or before June 5, 1985, and ordering DER and any other appellee to file an answering pre-hearing memorandum within fifteen (15) days after receipt of Appellant's pre-hearing memorandum. Intervenor filed his petition to intervene on April 24, 1985. The Board granted said petition on May 5, 1985. Appellant filed its pre-hearing memorandum on June 3, 1985, along with a certificate of service stating that copies of Appellant's memorandum had been sent to DER and Intervenor on May 31, 1985. No answering pre-hearing memoranda having been filed by either DER or Intervenor, the Board on May 14, 1986, sent a default notice to said parties advising them that they had until May 27, 1986, to file their memoranda or risk sanctions by the Board. Having still not received any response, the Board on June 20, 1986, sent a second default notice to DER and Intervenor, giving the parties until June 30, 1986, to file their pre-hearing memoranda. As of the date of this opinion, neither DER nor Intervenor has replied in any way to Appellant's pre-hearing memorandum or the Board's default notices.

In situations such as the one which is present in this case, the Board may impose sanctions, including a default adjudication. The power of the Board to impose such sanctions is governed by 25 Pa. Code §21.124:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violation of orders, or such other sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Courts of Common Pleas.

See also, Daniel A. Marino Jr. v. DER, 1984 EHB 54, Harman Coal Co. v. DER, 1984 EHB 543, and Armond Wazelle v. DER, 1983 EHB 576. The Board could issue a default adjudication. DER and Intervenor have failed to communicate in any way with the Board in this case despite over a year's time and two default notices. However, the Board hesitates to decide a case simply on procedural grounds, particularly in a situation such as this where Appellant bears the burden of proof. Therefore, the Board imposes the following sanctions: If and when hearing on the merits is held, DER and Intervenor's participation will be limited to cross-examination of Appellant's witnesses and to presentation of such evidence as normally would be offered in rebuttal.

ORDER

AND NOW, this 24th day of July, 1986, for the reasons stated above, if this matter comes to a hearing on the merits, DER's and Intervenor's participation will be limited to cross-examination of Appellant's witnesses and to presentation of such evidence as normally would be offered on rebuttal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 25, 1986

cc: Bureau of Litigation

For the Commonwealth:
Louise S. Thompson, Esq./Eastern

For Appellant:
Philip R. Detwiler, Esq.

For Intervenor:
Thomas M. Garrity, Esq.

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ETNA EQUIPMENT & SUPPLY COMPANY, INC. :

v. : Docket Nos. 86-146-G
86-147-G

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

The petition to intervene filed by the surety on the bonds which are at issue in this bond forfeiture appeal is provisionally denied. The interests of the surety and the principal on the bond appear to be identical. Therefore, the requirements of 25 Pa.Code §21.62 have not been met, i.e., the petitioner has failed to show that its interests will not be adequately represented in this appeal. The petitioner, however, may renew its petition for intervention if, at a later stage of these proceedings, it becomes apparent that intervention is necessary to adequately protect its interests.

OPINION

Etna has appealed five DER letters, dated February 12, 1986, notifying ETNA that DER has forfeited a number of bonds posted by Etna in connection with Etna's surface mining operations. Two of these letters, whose appeals are docketed as captioned above, involve bonds wherein Fortune Assurance Company ("Fortune") is the surety. The DER forfeiture letters stated that Fortune was advised of DER's action by certified mail.

On June 12, 1986, Fortune petitioned to intervene in the above-captioned appeals. The two petitions to intervene were identical, and read as follows (in pertinent part and essentially in toto):

> 1. Petitioner is Fortune Assurance Company, Inc., a Pennsylvania corporation, with offices at 1500 Chestnut Street, Suite 801, Philadelphia, PA 19102.
>
> 2. Petitioner believes it is entitled to intervene in the above matter for the following reasons:
>
> (a) Petitioner is the Surety on the bonds posted for two (2) sections which are the subject matter of the instant forfeiture.
>
> 3. Petitioner has an interest in the within matter for the following reasons:
>
> (a) Petitioner is the Surety on the bonds posted for two (2) sections which are the subject matter of the instant forfeitures.

4. Petitioner will present the following kinds of evidence at a hearing on the merits of the matter.

(a) Petitioner will present evidence with respect to the amount of each forfeiture and the appropriateness thereof.

(b) Petitioner is advised that the work required on the affected parcels is less than stated in the Notice of Forfeiture.

5. Petitioner believes that its interest may be inadequately represented in the proceedings by the current parties of record because:

(a) Petitioner is advised that counsel for Respondent, Etna Equipment and Supply Company, Inc. intends to withdraw from the proceedings.

It is the Board's practice, per our Pre-Hearing Order No. 2, to allow the parties twenty (20) days for response to a motion or petition. On June 18, 1986, before the Board had ruled on Fortune's petitions, therefore, the Board received a letter from counsel for Etna, dated June 11, 1986, advising that DER and Etna were requesting a general continuance of these appeals, pending Etna's possible decision to withdraw the appeals. In the meantime the Board, in a letter dated June 13, 1986, had advised Etna that its pre-hearing memoranda in these appeals had been due June 2, 1986 (per the Board's Pre-Hearing Order No. 1), and that failure to file these pre-hearing memoranda by June 30, 1986 would risk sanctions under 25 Pa.Code §21.124, including possibly dismissal of the

appeals. On June 26, 1986 Fortune filed a motion requesting the Board to grant Etna an extension of time, until September 2, 1986, to file Etna's pre-hearing memoranda. However, on July 2, 1986, Etna, through its counsel, filed its pre-hearing memoranda.

The Board has not yet ruled on any of the above-listed pending matters, namely:

1. Fortune's petition to intervene.
2. Etna's and DER's joint request for a general continuance.
3. Possible sanctions for Etna's failure to timely file its pre-hearing memoranda.

We proceed to rule on these items.

Fortune's petitions to intervene in these appeals are provisionally denied. This issue in these appeals is squarely on point with our recent ruling in Right of Way Paving Company, Inc. v.DER, Docket No. 86-079-G (Opinion and Order, June 5, 1986). In Right of Way ("ROW") a surety also petitioned to intervene in an appeal of DER's bond forfeiture action, long after the time to appeal the forfeiture action had passed. 25 Pa.Code §21.52(a). We declared in ROW, and herewith repeat:

> [Surety] law indicates that the interests of AIC [the appellant] and ROW are identical... Moreover, the agreement between a principal and its surety normally gives the surety complete rights to control litigation involving the principal which might endanger the surety's bond. AIC has given the Board absolutely no reason to believe that it does not have such rights in the present appeal.

Fortune also has given the Board absolutely no reason to believe that it does not have the right to control this litigation.

However, because Etna is considering withdrawal of its appeals, an action which would adversely affect Fortune's interests, we are denying Fortune's petitions only provisionally (as we did in ROW). If Fortune can convince us that it does not control this litigation, so that its intervention is required to protect its interests, to the point where the requirements of 25 Pa.Code §21.62 are met, we will reconsider our ruling.

In the meantime, in view of ETNA's and DER's joint request for a general continuance, said continuance is granted, for a time ninety (90) days from the date of this Opinion. On or before the date 90 days from the date of this Opinion, Etna must either:

> (i) withdraw these appeals; or
> (ii) request that DER be ordered to file its pre-hearing memoranda, so that these appeals can go forward; or
> (iii) show very good reasons why these appeals should again be continued.

Failure to meet at least one of these requirements (i), (ii) or (iii) by ninety (90) days from the date of this Order once again will risk sanctions, including possible dismissal of these appeals, under 25 Pa.Code §21.124. We will not impose sanctions for Etna's failure to meet the June 30, 1986 deadline date for filing its pre-hearing memoranda, in view of the fact that they did get filed on July 2, 1986.

O R D E R

WHEREFORE, this 28th day of July, 1986, Fortune's petitions to intervene in the above-captioned appeals are provisionally denied; these appeals are generally continued for ninety (90) days; on or before ninety days from the date of this Order, Etna must take one of the alternative actions described in the accompanying Opinion, under pain of sanctions possibly including dismissal of the appeals.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: July 28, 1986

cc: Timothy J. Bergere, Esq./ for DER

Harry F. Klodowski, Esq./ for Appellant

Bureau of Litigation/Harrisburg

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

PENN MINERALS COMPANY :
:
:
v. : Docket No. 85-221-G
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 31, 1986

OPINION AND ORDER

Synopsis

An appeal of a bond forfeiture is dismissed, though DER bears the burden of proof, where the appellant failed to file its pre-hearing memorandum after numerous extensions of time and two certified letters warning of possible default if the pre-hearing memorandum was not filed. The first of these warning letters was returned unclaimed, but the Board took the additional step of mailing a second default warning to another address furnished by the Post Office; this second letter was received by the appellant, but the pre-hearing memorandum still was not filed.

OPINION

Appellant has appealed DER's forfeiture of surety bonds posted at appellant's mining operation in Jefferson County. The surety has been notified, but has not intervened nor filed an appearance. Appellant's pre-hearing memorandum originally was due August 26,

1985. At appellant's request, several extensions of time for filing its pre-hearing memorandum have been granted, with the last extension to March 27, 1986. On April 7, 1986, no pre-hearing memorandum having been filed, and no other request for an additional extension of time having been received, the Board sent appellant a certified letter, return receipt requested, to the Texas address given on appellant's notice of appeal, namely

c/o Thomas L. Crome
6536 Harvest Glen
Dallas, TX 75248

The letter advised the appellant that sanctions might be imposed, including possible dismissal of the appeal, unless the pre-hearing memorandum was received on or before April 22, 1986.

This letter was returned by the Post Office, stamped "Unclaimed", but with an affixed sticker giving Mr. Crome's new address as

4130 Proton Drive, No. 48A
Addison, TX 75244-3517

On May 22, 1986, therefore, the Board sent another certified letter, return receipt requested, to the Proton Drive address, giving the appellant until June 6, 1986 to file its pre-hearing memorandum, under threat of sanctions including possible dismissal. The receipt from this letter has been returned to the Board as received, but as of this date no pre-hearing memorandum has been filed.

In bond forfeiture appeals, where DER bears the burden of

proof, the Board has been reluctant to dismiss an appeal of a bond forfeiture solely for appellant's failure to file its pre-hearing memorandum, especially when the appellant is not represented by counsel, as in this appeal. Coltrane, Inc. v. DER, Docket No. 85-134-G (Opinion and Order, August 29, 1985). On the other hand, the Board does not have any duty, or even a moral obligation, to remind an appellant of its responsibility to obey the Board's orders, e.g., the requirement to file a pre-hearing memorandum. Once the Board's efforts to get an appellant to file its pre-hearing memorandum have gone beyond some reasonable point without success, the Board has not hesitated to dismiss an appeal from a bond forfeiture for failure to file a pre-hearing memorandum. Robert J. Johnston v. DER, Docket No. 82-008-M (Opinion and Order, June 17, 1982); Ira W. Fast v. DER, Docket No. 85-298-W (Opinion and Order, January 24, 1986).

In Ben Franklin Coal Company v. DER, Docket No. 83-224-G (Opinion and Order, February 23, 1984), we dismissed the appeal for failure to file the pre-hearing memorandum, even though DER bore the burden of proof, when the Board's warning letter to the appellant was returned "unclaimed." We stated,

> It is the Appellant's responsibility to respond to the Board's orders; the Board cannot track down the Appellant.

In the present appeal, the Board took the extra step of sending yet another letter warning of possible dismissal to the appellant, mailed to the new address the Post Office--not the appellant--had

furnished. This letter, though received, has not impelled the appellant to file its pre-hearing memorandum. Ergo we see no alternative but to dismiss this appeal.

O R D E R

WHEREFORE, this 31st day of July, 1986, this appeal is dismissed for failure to obey the Board's orders. 25 Pa.Code 21.124.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, Chairman

Edward Gerjuoy
EDWARD GERJUOY, Member

William E. Roth
WILLIAM ROTH, Member

cc: Bureau of Litigation/Harrisburg
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
Thomas L. Crome
Addison, Texas

DATE: July 31, 1986

LOWER PROVIDENCE TOWNSHIP :
:
:
V. : Docket No. 84-338-G
: Issued: August 7, 1986
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and COUNTY OF MONTGOMERY, Permittee

ADJUDICATION

By Edward Gerjuoy, Member

Syllabus

Where a municipality challenges a DER order, pursuant to the Sewage Facilities Act 35 Pa. P.S. §750.10(1), to the municipality to revise its official sewage facilities plan it is the municipality which carries the burden of proof. To sustain its burden of proof the municipality must show that DER's action was an abuse of discretion or an arbitrary exercise of its duties or functions. DER has the authority to grant a private request for a sewage facilities plan revision and to order the same when a municipality fails or refuses to do so itself without a valid reason. When considering such a request DER must follow each of the guidelines of 25 Pa. Code §71.17.

Unintentional minor discrepancies in a planning module which are not crucial to the decision-making process do not constitute a basis for overturning an otherwise legitimate DER decision. Further, DER must consider applicable zoning and subdivision regulations, but not to the exclusion of all else, and DER's consideration must be guided by relevant legal precedent.

An interim on-site sewage treatment plant is not necessarily inconsistent with a comprehensive water quality management plan, even where the facility which would otherwise treat the sewage is overloaded. Absent obvious evidence that the operation of such a plant will cause environmental degradation, an order for a plan revision to accommodate said plant is within DER's discretion, particularly where a more complete examination will take place at the permitting stages. Further, although 25 Pa. Code §71.17 does not instruct DER to give special credence to requests for plan revisions involving facilities of public need, it is reasonable to infer that if under §94.54 and §94.57 it would not be an abuse of DER's discretion to allow connection to a hydraulically overloaded sewage treatment plant, then it cannot, on that basis alone, be an abuse of DER's discretion to allow an interim on-site plant which avoids a discharge into an overloaded facility.

INTRODUCTION

The above-captioned appeal originated in the needs of the County of Montgomery ("County") for a new county prison. County's present prison is overcrowded; indeed, County apparently has been forced to house prisoners, sometimes in numbers approaching one hundred, in other non-county facilities at a cost of $40 per prisoner per day. County chose to place its new prison on land it owned in Lower Providence Township; this land already had been designated for use as a prison farm.

The prison also will be a generator of sewage in Lower Providence Township. For the most part, Lower Providence Township's sewage presently is carried to, and treated in, the so-called Oaks Sewer Treatment plant ("Oaks plant"). The Oaks plant has been hydraulically overloaded for many years, however. The County, therefore, decided to handle the prison-generated sewage by means of an interim on-site sewage treatment facility ("on-site plant"),

whose discharged treated effluent would not be carried to the Oaks plant. Pursuant to this end, and in order that construction of the on-site plant be lawful under 25 Pa. Code §§71.15(b) and 71.45(e), County requested Lower Providence Township ("Appellant") to revise its Official Sewage Facilities Plan ("Official Plan") so as to accommodate the proposed on-site plant. Under Section 5 of the Pennsylvania Sewage Facilities Act ("SFA"), the Act of January 24, 1966 as amended, 35 P.S. §750.5, Appellant is required to maintain an Official Plan providing for the sewage disposal needs of areas within the Appellant's jurisdiction.

Appellant denied County's request for a revision to Appellant's Official Plan. Pursuant to SFA §750.5(b) and 25 Pa. Code §71.17, County then requested DER to order Appellant to revise its Official Plan to accommodate the proposed on-site plant. DER granted County's request over Appellant's objections. Appellant's appeal of DER's order to Appellant to revise its Official Plan is the subject of this Adjudication.

Hearings on the merits of this appeal were held September 9-11, 1985 by then Board Member Anthony Mazullo, Jr. Member Mazullo resigned from the Board on January 31, 1986, before preparing an adjudication. Thereafter, this appeal was reassigned to Board Member Edward Gerjuoy, who has prepared the initial draft of this adjudication from the record[1] made September 9-11, 1985. The hearing on the merits was closed on September 11, 1985. The parties have not requested the Board to reopen or otherwise supplement the record; the parties have filed their post-hearing briefs. Therefore, this adjudication has not been based in any way on the record of the hearing held

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[1] References to the transcript of the September 9-11, 1985 hearings will be denoted by N.T.; Appellant's exhibits are denoted by Ex.A-number; County's exhibits are labeled Ex.R-number.

on December 19, 1985 by Mr. Mazullo, on petitions for supersedeas filed by the Appellant in the above-captioned appeal and in three related appeals.[2]

Board Chairman Maxine Woelfling has recused herself from participation in this appeal. On April 28, 1986, therefore, when the Board vacancy left by Mr. Mazullo's resignation had not yet been filled, Member Gerjuoy asked the parties if they would object to having this appeal adjudicated solely by him. The parties did object. This issue now has been mooted, however, by the Pennsylvania Senate's June 24, 1986 confirmation of William A. Roth to fill the Board vacancy. Thus, this adjudication, signed by Board Members Gerjuoy and Roth, fully comports with the majority vote requirement of 25 Pa. Code §21.86(a).

FINDINGS OF FACT

1. Appellant is a township of the second class, located in Montgomery County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency entrusted with the administration of the SFA and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), and the rules and regulations promulgated under these acts.

3. Permittee is the County, a county of the Second Class-A, which owns approximately 149.64 acres of land in Lower Providence Township; this property known as the County Prison Farm, (the "Farm"), is located at the end of Wilson Boulevard, and is bounded by Eagleville Road, Visitation Road, Fern Road, and Grange Avenue. (Ex. A-15).

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[2] The Board has denied supersedeas in the above-captioned appeal (Opinion and Order at Docket Nos. 84-338-G, 85-239-G, 85-267-G and 85-371-G, May 13, 1986).

4. County is building a new prison facility on said location, and proposes that the facility be serviced by an interim sewage treatment plant, to be constructed on the Farm.

5. The Farm area presently is zoned for residential use. (Ex. A-16).

6. On February 14, 1972, Appellant adopted its Official Plan, which had been prepared in cooperation with the Montgomery County Planning Commission ("Commission"); DER approved said plan on June 15, 1973. (Ex. A-18).

7. Under the presently effective Official Plan, sewage generated by occupants of the Farm is to be connected to, and hence treated by, the Oaks plant, which is owned by the Montgomery County Sewer Authority ("Authority").

8. Since the mid-1970's the Oaks plant has been hydraulically overloaded, so that additional connections have been prohibited pursuant to 25 Pa. Code §94.21. (N.T. 72; Ex. A-9).

9. On November 2, 1983, County requested Appellant to revise its Official Sewage Facilities Plan in order that County might lawfully construct the interim on-site sewage treatment plant. (Ex. A-18).

10. County's Planning Module, filed with the Township in connection with this request, was in proper form, although the request contained only a short reference to possible alternatives; statements were provided to the effect that alternatives had been considered and dismissed as unworkable. (N.T. 225).

11. By letters dated February 24 and March 19, 1984, after some evaluation of the Planning Module, Appellant refused the request. (Ex. A-18).

12. On April 13, 1984, pursuant to SFA §750.5(b) and 25 Pa. Code §71.17, County submitted a private request to DER to order Appellant to revise its official plan. (N.T. 49).

13. By letter dated May 9, 1984, Appellant, in response to DER notification per 25 Pa. Code §71.17(b), submitted comments to DER. Appellant cited violations of Township subdivision and land development ordinances, and pointed to perceived inadequacies of the proposed interim method of sewage disposal. (Ex. A-18).

14. On August 17, 1984, DER ordered Appellant to revise its official plan to accommodate the County's request. (Ex. A-18).

15. On September 17, 1984, Appellant filed an appeal of DER's August 17, 1984 order with the Board.

16. In issuing its order, DER sought to comply with the requirements of 25 Pa. Code §71.17(c); in particular, DER considered: (1) the specifics of County's request; (2) Appellant's reasons for refusing County's request; (3) Appellant's past actions in approving plans for the Farm; (4) applicable zoning and subdivision regulations; and (5) Appellant's existing plan. (N.T. 93; Ex. A-18).

17. In ordering the Plan revision DER also considered the immediacy of the need, the unique character of the prison facility, and County's mandate to provide such a facility. (N.T. 78, 107).

18. DER's order also specifically took notice of the February 27, 1984 Montgomery County Court of Common Pleas decision in Montgomery v. Wood et al. #81-22877 (confirmed on remand May 28, 1985), holding that the Township Zoning ordinances were not applicable to the County. (N.T. 152).

19. In the cases of Lower Providence Township v. Paul B. Bartle et al. #84-10350 (Issued May 24, 1985) and McFarland et al. v. Parkhouse 85 Cmwlth Ct. 467, 482 A.2d 1177 (1984), the Montgomery County Court of Common Pleas and the Commonwealth Court respectively have held that various ordinances promulgated by Appellant, including Appellant's subdivision ordinance, cannot

restrain County from building its prison in the Township.

20. DER was aware that the analysis of possible alternatives to the proposed on-site plant which had been provided to Appellant could have been more complete; because a complete analysis had been provided to DER, however, DER felt free to make a decision. (N.T. 22).

21. The main alternatives considered by County were:

1) Lagooning with spray irrigation and winter storage;

2) Lagooning with spray irrigation except during winter, when a point discharge following tertiary treatment would reduce winter storage requirements;

3) As in (1) above but replacing lagooning with a package plant;

4) As in (2) above but replacing lagooning with a package plant;

5) Package plant, with all year long point discharge following tertiary treatment.

(N.T. 313, Ex. R-6).

22. The sewage disposal method chosen involves a package plant with point discharge following tertiary treatment. (N.T. 313; Ex. A-4). The plant will be so situated that sewage will arrive strictly by gravity. (Ex. A-4). Treated effluent will be discharged to a steeply sloped swale which discharges into an intermittent stream called Eagle Creek, which in turn leads to the Skippack Creek. (N.T. 286, 306; Ex. A-4).

23. DER participated in the evaluation of the possible alternatives to the sewage disposal method which was selected; this participation included tests of soil suitability. (N.T. 229-39).

24. DER has made a preliminary determination of effluent criteria for the potential discharge. (N.T. 226; Ex. A-19).

25. The Skippack Creek is classified as a Trout Stocking Fishery, not as a High Quality Stream under 25 Pa. Code §93.9. (N.T. 286).

26. Present plans call for the discharge of 53,000 gallons per day of effluent. (Ex. R-4).

27. Five residences with private wells are located approximately 500 feet from the discharge point, as is shown on the map accompanying the Planning Module County submitted.

28. The Montgomery County Planning Commission recommended that DER order the plan revision. (N.T. 250; Ex. R-5).

29. In its order to Appellant requiring a plan revision to accommodate the County's proposed use of the Farm, DER explicitly took note of the fact that the proposed use involved a correctional facility, which is a "facility of public need," as defined in 25 Pa. Code §94.1. (Ex. A-18).

30. County's Planning Module was prepared in accordance with the requirements of 25 Pa. Code §71.15(d).

31. The submitted Planning Module, on p. II-3, answered "No" to the question: "Are there any private wells within the general location of the sewage discharge?" (Ex. R-4).

32. The narrative portion of the submitted Planning Module states, under the heading "Adjacent Land Use," "There are presently no residential buildings within 1000 ft. of the proposed sewage treatment plant site." (Ex. R-6).

DISCUSSION

A. Burden of Proof

The burden of proof in this appeal falls on Appellant. The Board's rule pertaining to burden of proof, 25 Pa. Code §21.101, does not specifically address appeals by municipalities from DER orders to revise

their official sewage facilities plans. According to Board precedent in appeals of this sort, however, the appealing municipality has the burden of proof. Haycock Township v. DER, Docket No. 83-058-M (Adjudication, November 21, 1985; Lathrop Township Board of Supervisors v. DER, 1979 EHB 259. To sustain its burden of proof, Appellant must show that DER action of ordering Appellant to revise its Official plan, was an abuse of discretion or an arbitrary exercise of DER's duties or functions. Warren Sand & Gravel Co. v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975).

In general, unless an appellant can show DER did not abide by applicable statutes and regulations, DER's discretionary actions will not be an abuse of DER's discretion; for the Board to hold otherwise under the circumstances just stated, an appellant must show that compliance with the applicable statutes and regulations is insufficient for DER to meet its broad statutory obligations, e.g., to protect the public health, safety and broad welfare. Coolspring Township v. DER, 1983 EHB 151; Township of Indiana v. DER, 1984 EHB 1; Sanitary Authority of the City of Duquesne v. DER, 1984 EHB 635; 25 Pa. Code §510.17(1). It must be remembered that the Commonwealth Court has instructed DER to enforce regulations literally. East Pennsboro Township Authority v. DER, 334 A.2d 798 (Pa. Cmwlth 1975).

In short, Appellant's burden in this appeal is to show (i) that DER did not abide by applicable statutes and regulations, or (ii) that even though DER abided by applicable statutes and regulations, its order to the Appellant to revise Appellant's Plan failed to comport with DER's broad statutory obligations. We do not believe Appellant met either prong (i) or (ii) of this just-stated burden, and therefore dismiss the above-captioned appeal. Before explaining in detail the basis for our conclusion that Appellant did not meet its burden, a few preliminary remarks concerning the relevant

statutory and regulatory scheme are in order.

B. The Relevant Statutory and Regulatory Scheme

The SFA, 35 P.S. §75.10(1), gives DER the power to order Appellant to revise its official plan; the procedure DER must follow when DER receives a private request that a municipality be ordered to revise its official plan is stated in 25 Pa. Code §71.17. The language of §71.17 makes it apparent that a municipality can be ordered to revise its official plan despite the municipality's opposition. The Board has not hesitated to order unwilling municipalities to revise their official plans. Township of East Union v. DER, 1980 EHB 118; Township of Concord v. DER, Docket No. 84-245-M (Adjudication, January 17, 1985). Moreover, DER has the responsibility to grant a private request for a plan revision and to order the same when a municipality fails or refuses to do so itself without a valid reason. Lathrop, supra. However, DER's order to a municipality to revise the municipality's official plan does not of itself revise the plan; the act of revision must be taken by the municipality.

25 Pa. Code §71.17(b) required DER to ask for Appellant's written comments concerning County's private request that DER order Appellant to revise its official plan. DER did ask for and received Appellant's written comments. DER's appealed-from August 17, 1984 letter which ordered Appellant to revise its plan despite Appellant's objections, took into consideration these objectives, as required by §71.17(c)(1). To be specific, DER's August 17, 1984 letter to Appellant, after reciting the procedural history leading up to DER's order, went on to explain:

> 7. The Department has evaluated the County's ~~request~~ for a revision to the Plan and has taken into consideration:
>
> A. County's reason for the request compared

with the Township's reason for opposing the revision.

B. Township's past actions in approving the plans for the lot in question.

C. Applicable zoning and subdivision regulations in applicable plans.

D. Township's Plan.

8. By order of February 27, 1984, in the equity action, County of Montgomery vs. Wood, et al, No. 81-22877, the Court of Common Pleas in Montgomery County determined the Township's ordinances to be not applicable to the County for the purpose of the County constructing the correctional facility.

9. While studies are being conducted on behalf of the Township as to how best to provide long-term sewerage services in the area, the County's proposed method is acceptable to provide service for the immediate needs of the County.

10. The Township's Plan is inadequate as currently in effect to accommodate the proposed correctional facility.

The above-quoted language is consistent with the requirements of §71.17(c). Appellant has not given us any reason to believe that the above-quoted language inaccurately describes DER's evaluation of the County's request. We conclude that, in dealing with County's private request, DER did comply with the procedural requirements of 25 Pa. Code §71.17, especially §71.17(c). Similarly, on the evidence before us, we conclude that DER has complied with the procedural requirements of whatever other statutes and regulations may be germane to DER's decision to order Appellant to revise its Plan.

C. Appellant's Claims

We shall examine the objections to DER's appealed-from order that Appellant has raised in its post-hearing brief. Any other issues which Appellant may have raised in its notice of appeal, pre-hearing memorandum or

pleadings prior to the hearing on the merits are deemed waived. Robert Kwalwasser v. DER, Docket No. 84-108-G (Adjudication, January 24, 1986); Equipment Finance, Inc. v. Toth, 476 A.2d 1366 (Pa. Super. 1984); Schneider v. Albert Einstein Medical Center, 390 A.2d 1271 (Pa. Super. 1978).

Those objections of Appellant which are before us may be summarized as follows:

> 1. County's Planning Module, on which DER relied in reaching its decision, does not furnish all relevant information and actively misrepresents material facts.
>
> 2. DER failed to consider Appellant's subdivision regulations.
>
> 3. The ordered Plan revision is not consistent with a comprehensive program of water quality management in the watershed wherein the proposed on-site treatment plant will be situated.
>
> 4. County's prison project will cause degradation of the waters of the Commonwealth and violates Article I Section 27 of the Pennsylvania Constitution.

Although Appellant's brief does not always make clear the legal context of these objections, in general Appellant appears to be arguing that these objections establish DER's failure to abide by applicable statutes and regulations. Appellant has not clarified whether these DER failures were procedural or substantive. As we have explained, however, on the evidence we cannot conclude that DER's violations, if any, of applicable statutes and regulations can be characterized as a failure by DER to abide by procedural requirements, e.g., the requirements in 25 Pa. Code §71.17(c) that DER give consideration to Appellant's written comments on the County's private request for a plan revision. Therefore we will regard the aforesaid objections 1-4, and Appellant's arguments in support thereof, as attempts by Appellant to establish that DER violated the substantive requirements of applicable

statutes and regulations. In other words, again using §71.17(c) as an illustration, we take Appellant's claim in connection with §71.17(c) to be that DER's decision to order the plan revision in the face of Appellant's comments was so unreasonable as to constitute an abuse of DER's discretion; we do not believe Appellant is arguing that DER did not even consider Appellant's written comments, but insofar as Appellant is so arguing we reject this thesis of Appellant's, for reasons explained supra.

We now proceed to a detailed discussion of Appellant's arguments, under subheadings suggested by the above list of Appellant's objections.

1. County's Planning Module

Appellant argues that County's Planning Module, which was submitted first to the Township and thereafter to DER, was deliberately deceptive, to a degree warranting overturn of DER's order to Appellant. The facts which--according to Appellant--constitute the serious deception warranting reversal of DER's order are as follows. County's Planning Module was accompanied by a map which indicated (according to Appellant's engineer's unrebutted testimony) that there are residences with private water wells within approximately 500 feet of the anticipated discharge point from the County's proposed treatment plant. Nevertheless, the County responded "No" to the question, "Are there any private wells within the general location of the sewage discharge?"; in addition, the nonactive portion of the Planning Module stated, under the heading "Adjacent Land Use," "There are presently no residential buildings within 1000 ft. of the proposed sewage treatment plant site." In support of its argument that these facts warrant reversal of DER's order, Appellant cites Mr. and Mrs. Kevin Abraham v. DER, 1980 EHB 146.

Although the foregoing facts are clearly established by the record, and the seeming discrepancies have not been satisfactorily explained by the

County, we cannot see that they warrant the draconian remedy Appellant urges, namely reversal of DER's order. After all, the map's locations of the residential water wells were accurate, as was the statement about the absense of residential buildings near the plant site. Moreover, the presence or absence of residential buildings near the plant site is a relevant factor in considerations of whether the plant site should be built; granted that the presence or absence of residential buildings near the sewage discharge point also is a relevant factor for consideration, it is not obvious to us--as it apparently is obvious to Appellant--that the statement about there being no buildings near the plant was inserted in the Planning Module solely for purposes of deception. Consequently the only demonstrated explicit or implicit discrepancy with accurate fact in the Planning Module was the Module's denial that there were private wells within the "general location" of the sewage discharge, a discrepancy (if this is indeed a discrepancy) which--though not lightly excusable, nor lightly excused by us--easily can be ascribed to carelessness rather than to deliberate misrepresentation, especially since the map did accurately locate the residences relative to the discharge point. Ultimately the error on P. II-3 of the Planning Module (see Finding of Fact 31) should be corrected, if it has not been corrected already; the Planning Module on which the plan revision rests should be accurate. But, for reasons amplified infra, changing the denial of the existence of private wells "within the general location of the sewage discharge" to an affirmation will not in any way modify the analysis which has led us to dismiss this appeal. Under the facts of this appeal the denial instead of affirmation was a purely technical easily correctible error, again for reasons amplified infra. Such errors are not a proper basis for overturning an otherwise legitimate DER action. Coolspring Township, supra; Kwalwasser, supra.

An essential factor in the foregoing legal analysis, and in the legal analysis infra as well, is the recognition that whether residential water wells are located 500 ft. rather than 1000 ft. from the sewage discharge point is very far from crucial[3] to the issue before us, which--we must not forget--is whether DER abused its discretion in ordering Appellant to revise its official plan to accommodate a sewage treatment plant on the site. Appellant's plan revision would not have been a permit for County to operate the sewage treatment plant; that permit still would have to be obtained, and would involve an NPDES permit to discharge from the plant at the proposed discharge point. In fact, such an NPDES permit grant from DER to County already has been appealed by this same Appellant, at Docket No. 85-239-G. If the discharge from the sewage treatment plant will endanger residential wells, as Appellant claims, that claim should be pressed in the appeal at Docket No. 85-239-G. In the instant appeal, the primary issue is whether County deserves the right to construct a sewage treatment plant enabling County's use of County's land, assuming arguendo that operation of the sewage treatment plant will not cause unlawful environmental harm, e.g., will not degrade residential wells. Of course, if it were shown ab initis that Appellant is being ordered to revise its official plan to accommodate a sewage treatment plant which inevitably will cause unlawful environmental harm, then Appellant legitimately could claim the order was an abuse of DER's discretion. But there has not been any such showing in this appeal; there are no regulations forbidding discharge from a private sewage treatment plant within 500 ft. of a residential water well, and Appellant has not given any

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[3] The discrepancy was crucial in Kevin Abraham, supra, ~~which Appellant~~ cites, and therein lies a crucial distinction between Kevin Abraham and the instant appeal.

reasons for believing the anticipated NPDES-permitted discharge parameters inevitably will degrade residential water wells 500 ft. from the proposed discharge point.

Appellant also claims County's Planning Module inadequately analyzed the alternatives to the County's proposed sewage treatment method, allegedly in violation of 25 Pa. Code §§71.14 and 71.15; this alleged inadequacy had been conveyed by Appellant to DER in Appellant's comments on County's private request to DER under 25 Pa. Code §71.17. According to Appellant, DER's appealed-from order to Appellant under these circumstances was an abuse of DER's discretion. We are not impressed by this argument, however. In the first place, although we agree that it is reasonable to require some discussion of alternatives in the Planning Module, the Code sections 71.14 and 71.15 cited by Appellant do not make that requirement explicit, nor do they implicitly specify how intensive the analysis of alternatives must be; the only specific reference to "alternatives" in those two Code sections is found in §71.14(7), and that subsection obviously is not germane to this appeal. Secondly, DER's decision on the private request was based on a more thorough analysis of the alternatives that was provided to DER by County. In any event, at our de novo hearing on the merits, Appellant did not show that DER acted on an inadequate analysis. Thus DER's order, under the facts described, at worst falls into the category of purely technical easily correctible (and in this instance already corrected) errors which, as previously explained, are not a proper basis for overturning an otherwise legitimate DER action. Moreover, and most importantly, Appellant's insistence on this point once again betrays Appellant's failure to understand the true implications of DER's order. Appellant argues Appellant needed the analysis of alternatives in order to accurately evaluate the environmental implications of

the proposed treatment plant. But, as we have explained supra, even if DER has over-optimistically assessed the environmental hazards of the proposed plant (and there has been no showing by Appellant that DER has been over-optimistic), any such deficiency of DER's decision-making still can be attacked via appeals of the operating permits County must apply for and receive from DER.

2. Appellant's Subdivision Regulations

Appellant next argues that DER failed to consider Appellant's subdivision regulations, as required by 25 Pa. Code §71.17(c)(3). However, DER's order clearly states that the subdivision regulations were considered; Appellant's comments on County's private request, which contain references to the subdivision regulations, also were reviewed by DER. On direct examination by Appellant, DER's Regional Sewage Facilities Consultant Glenn Stinson appeared to indicate at one point that the subdivision regulations might not have been properly considered, but on cross examination he indicated they were considered at least generally, along with Appellant's zoning regulations. The Board finds that the Appellant has not met its burden of showing DER did not consider Appellant's applicable zoning and subdivision regulations, as required by 25 Pa. Code §71.17(c)(3).

Appellant also appears to argue that--whether or not DER "considered" Appellant's zoning and regulations--DER's order to Appellant was an abuse of discretion in that the order would permit County to build the treatment plant in violation of the Township's applicable regulations. This argument is totally without merit in the light of clearly relevant precedent. County of Montgomery v. Lois Wood et al. and Lower Providence Twsp., C.P. Mtgy. No. 81-22877, Issued May 28, 1985; Lower Providence Twsp. v. Paul B. Bartle, et al., C.P. Mtgy. No. 84-10350, Issued May 24, 1985; and McFarland et al. v.

Parkhouse, 85 Cmwlth Ct. 467, 482 A.2d 1177 (1984). In these cases, which the parties' briefs discuss, the Montgomery County Court of Common Pleas and the Pennsylvania Commonwealth Court have held that the various ordinances of Appellant, including its zoning and subdivision regulations, cannot prevent the County from building its prison in the Township. Very recently, the Commonwealth Court has ruled that a county had pre-eminent power over a borough to override a zoning ordinance in order to build a new prison. Borough of Tunkhannock v. County of Wyoming, _____ Cmwlth. Ct._____, 507 A.2d 438 (1986). Tunkhannock favorably cited the McFarland case cited supra. While 25 Pa. Code §71.17(c)(3), relating to private requests to revise or supplement Sewage Facilities Plans, requires that applicable zoning and subdivision regulations be "considered" by DER, those considerations must be guided by relevant legal precedent. Borough of Sayre v. DER, 1979 EHB 25.

3. Comprehensive Water Quality Management Program

Appellant contends that DER violated the CSL and the SFA by ordering the Plan revision in that (according to Appellant) the interim sewage treatment facility is inconsistent with a comprehensive water quality management plan. The CSL 35 P.S. §691.4(5), and 25 Pa. Code §91.31 call for comprehensive water quality management; 25 Pa. Code §71.16(e) requires DER to consider whether a plan revision is consistent with a comprehensive program of water quality management as set forth in §91.31. However, Appellant has not shown that DER failed to consider whether the proposed on-site treatment plant is consistent with sound water quality management. A large portion of Appellant's post-hearing brief also seems to be arguing that until there is a plan to reduce the hydraulic overload at the Oaks plant (see Finding of Fact 8), no on-site treatment plant, e.g., the on-site plant which is the subject of the instant appeal, can be termed consistent with a sound

comprehensive water quality management plan. We do not believe this thesis is tenable as a general principle, nor has Appellant shown that the County's proposed on-site plant actually will be inconsistent with sound water quality management. In other words, Appellant has not shown that DER's considerations concerning the effect of the proposed on-site plant on sound water quality management were erroneous. As for Appellant's arguments that DER long ago should have dealt with the Oaks plant overload problem, those arguments are irrelevant to the issue of DER's discretion or lack thereof in ordering Appellant to revise its official plan; the present proposal does not involve a connection to the Oaks plant, and will not affect the Oaks plant's operations in any way.

Thus we reject Appellant's contentions concerning water quality management. Whatever merits those contentions may have, those merits cannot be stretched to a conclusion that DER's order to Appellant was an abuse of DER's discretion for failure to properly consider a comprehensive water quality plan.

4. Degradation of the Commonwealth's Waters

Appellant also claims that the proposed on-site plant will cause degradation of the waters of the Commonwealth. Appellant has not met its burden on this claim, however. For example, Appellant's allegation that there will be harm to Eagle Creek is supported, if at all, only by highly speculative testimony from Appellant's own engineer. In any event, as already explained supra, unless it is obvious that County cannot operate its treatment plant without causing environmental degradation (and no such assertion can be said to be obvious in this record), the order to Appellant was not an abuse of DER's discretion because the possible environmental degradation can be examined when the proposed plant receives operating

permits. For exactly the same reason, Appellant's claim that DER violated Article I Section 27 of the Pennsylvania Constitution cannot support the conclusion that DER's order was an abuse of discretion.

D. Conclusion

This concludes our detailed examination of Appellant's arguments. Despite the length of the foregoing discussions, we have not mentioned all of its claims. We state unequivocally, however, that we have considered all arguments raised in Appellant's brief, and that any we seem to have ignored have been rejected as without merit. For example, Appellant argues vehemently that DER's order must be an abuse of discretion because in the past, DER has denied various other proposed plan revisions by other persons which sought to construct on-site sewage treatment plants in the watershed served by the Oaks Plant. Such decisions obviously are very dependent on the specific case by case facts; therefore these past decisions, whose merits we cannot re-examine here, must be considered irrelevant to the merits of the instant appeal. In particular, we remark that none of the past refusals of on-site treatment plants to which Appellant refers involve a prison, which is a "facility of public need" according to 25 Pa. Code §94.1. 25 Pa. Code §§94.54 and 94.57 allow exceptions to sewer connection bans for facilities of public need. Although 25 Pa. Code §71.17 does not instruct DER to give special credence to private requests for plan revisions involving facilities of public need, it is reasonable to infer that if under §§94.54 and 94.57 it would not be an abuse of DER's discretion to allow connection of the County prison to a hydraulically overloaded sewage treatment plant (e.g., the Oaks plant, if it had been banned), then it certainly can't be an abuse of DER's discretion to allow service of the County prison by an on-site treatment plant which will not increase the hydraulic overloading of existing plants.

In sum, Appellant has not met its burden of showing that in issuing the appealed-from order DER did not abide by applicable statutes and regulations or otherwise fail to comport with DER's broad statutory obligations. In other words, Appellant has not met its burden of showing DER's order was an abuse of discretion or an arbitrary exercise of DER's duties and functions. This appeal must be dismissed.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this appeal.

2. Appellant, Lower Providence Township has the burden of proof in its appeal of a DER order issued pursuant to 25 Pa. Code §71.17, directing Appellant to revise its Official Plan.

3. Appellant did not meet its burden of showing that DER, in issuing its order of August 17, 1984 violated the CSL or any regulations promulgated thereunder.

4. Appellant did not meet its burden of showing that DER, in issuing its order of August 17, 1984, violated the SFA or any regulation thereunder.

5. Appellant did not meet its burden of showing that DER, in issuing its order of August 17, 1984 failed to properly consider each of the factors called for in 25 Pa. Code §71.17.

5. Issues not raised in Appellant's post-hearing brief have been deemed waived.

6. Unless it is obvious ab initis that County's proposed on-site treatment plant will cause unlawful environmental harm, this appeal of DER's order to amend the Appellant's official plan should be examined assuming arguendo that operation of the proposed plant will not cause environmental degradation.

7. DER's order of August 17, 1984 was not an abuse of DER's discretion or an arbitrary exercise of DER's duties and functions.

ORDER

WHEREFORE, this 7th day of August, 1986, DER's appealed-from August 17, 1984 order is affirmed and the appeal of Lower Providence Township at the above-captioned docket number is dismissed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

William A. Roth

WILLIAM A. ROTH, MEMBER

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Norristown, PA

DATED: August 7, 1986

HUGH K. JOHNSTON	:	
	:	
v.	:	EHB Docket No. 86-048-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 8, 1986
	:	
and	:	
	:	
GARY R. BUTTERS, Intervenor	:	

OPINION AND ORDER

Synopsis

Intervenor filed a Motion to Dismiss Appeal or, in the Alternative, to Compel Discovery. Intervenor's Motion to Dismiss is denied, while the Motion to Compel Discovery is granted in part and denied in part. The Board concludes dismissal is an overly severe sanction in this case. Intervenor's motion to compel is denied in part because the evidence sought is irrelevant, overly burdensome, and/or privileged, while Intervenor's motion to compel is granted due to Appellant's nonresponsive answer to Interrogatory.

OPINION

On December 12, 1985, the Department decided that a planning module prepared by Gary R. Butters, was adequate and constituted a supplement to Wellsboro's Official Sewage Facilities Plan. Appellant, Hugh K. Johnston, a resident and business owner in Wellsboro, filed a timely appeal from the approval of this planning module on January 31, 1986, asserting the issuance

of the planning module violated Section 5 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.5 and 25 Pa.Code §§94.52, 94.53 and 94.56. The Wellsboro Municipal Authority, Tioga County, which provides sewage service to Wellsboro, is subject to a 1972 ban on new multiple unit sewer hookups. Intervenor now seeks dismissal of this appeal or, in the alternative, a motion to compel Appellant to respond to Intervenor's Interrogatory requests numbers 4, 5, 6, 7, 9, 10, 10(b), 10(d), 11, 12(a), 12(b), 12(c), 13(b), 13(c), 13(d) and 13(e).

Intervenor's Interrogatory requests 4, 5, and 6 seek income tax records and related documents from Appellant for the apparent purpose of disproving damages. Intervenor requests these documents without specifically attacking Appellant's standing to bring this appeal. Intervenor's request for tax records and related documents is denied because this evidence is irrelevant to the scope of the pleadings. Evidence is relevant if it tends to make a fact at issue more or less probable. Rota v. Luzerne Township, 70 Pa. D & C 2d 51 (1975). The issue involved in this case is whether DER wrongfully deemed a plan supplement adequate. The facts Intervenor seeks to prove by production of Appellant's tax records are not at issue in this dispute. Consequently, Intervenor's Interrogatory requests 4, 5 and 6 are irrelevant to the proceedings, and are not reasonably calculated to lead to discovery of admissible evidence. Envirosafe v. DER et al., 1984 EHB 540.

Intervenor's Interrogatory requests 7 and 11 are denied because they impose an overly burdensome duty upon Appellant to produce information which is unreasonable for Appellant to generate. Intervenor's request for "each and every fact" which Appellant's witnesses will testify to at trial is impossible to generate at this stage in the litigation. Moreover, Intervenor's request of names and addresses of "each and every person" with knowledge of facts of

an Interrogatory request is similarly burdensome to Appellant. See Pennsylvania Game Commission v. DER, 1983 EHB 355.

Intervenor's Interrogatories repeatedly seek information from Appellant which has already been established in Appellant's Pre-Hearing Memorandum and other relevant pleadings in this case. Interrogatories 10(b), 10(d), 12(a), 12(b), 12(c), 13(b), 13(c) and 13(e) are denied because these requests seek to acquire cumulative information previously produced and equally accessible to Intervenor.

Intervenor's Interrogatories 9 and 10 are denied on the basis of the attorney-client privilege and work product doctrine. Interrogatory 9 seeks communications between attorney and client which are protected from discovery. Interrogatory 10 seeks Appellant's counsel's mental impressions with respect to counsel's legal research and conclusions drawn thereof. Although the work product doctrine and attorney-client privilege will not be allowed to shield discoverable information from production, Intervenor's requests in Interrogatories 9 and 10 exceed the scope of discoverable information from attorney and client. Smithkline Chemicals v. DER, EHB Docket No. 85-467-M (issued April 23, 1986).

Appellant is ordered to respond to Intervenor's Interrogatory 13(d). Appellant neglected to respond in any manner to this discovery request. Parties must respond to interrogatory requests with either responsive answers or objections. See Epstein v. Safeway Trails, Inc. 68 D. & C. 2d 175 (1974). If a party chooses to object to interrogatory requests, that party must specifically object and provide facts upon which the Board can render a determination as to the discovery conflict. Id. A party which is continually nonresponsive to discovery requests is subject to sanctions. See Magnum Minerals v. DER, 1984 EHB 627.

Intervenor's Motion to Dismiss is denied. Dismissal of this appeal for failure to comply with Intervenor's discovery request would constitute an unfair and draconian sanction in light of the facts and circumstances.

ORDER

AND NOW, this 8th day of August, 1986, Intervenor's Motion to Dismiss is denied. Appellant is ordered to comply with Intervenor's discovery request in accordance with the terms set forth above.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 8, 1986

cc: **Bureau of Litigation**
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For Intervenor:
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COX & COX
Wellsboro, PA

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BELL COAL COMPANY	:	EHB Docket Nos. 85-516-W
	:	85-524-W
v.	:	86-026-W
	:	86-027-W
COMMONWEALTH OF PENNSYLVANIA	:	86-101-W
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	86-102-W
	:	Issued: August 8, 1986

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis:

The Department of Environmental Resources' ("Department") request to dismiss a series of appeals relating to two mining operations is granted in part and denied in part. The appeals of Department inspection reports are dismissed because the inspection reports do not constitute appealable actions. The appeals from the issuance of compliance orders are not dismissed because they are, on their face, appealable actions and the Department has proferred no other basis for their dismissal.

OPINION

These matters involve a number of appeals filed by Bell Coal Company relating to two of its mining operations in Schuylkill Township, Schuylkill County. One operation was authorized by Mining Permit No. 7275SM13, while the other was authorized by Mining Permit No. 667M049. The appeal docketed at 85-516-W relates to Department inspection reports for the two sites which are dated October 31, 1985. The appeal docketed at 85-524-W relates to

inspection reports for both permitted areas dated November 21, 1985. The appeal docketed at 86-026-W relates to a December 23, 1985 report of an inspection of the site covered by Mining Permit No. 667M049. The appeal docketed at 86-027-W relates to a compliance order issued on December 23, 1985 as a result of an inspection of the area covered by Permit No. 7275SM13 on that same date. The appeal docketed at 86-101-W relates to a January 21, 1986 inspection of Permit No. 7275SM13 and a January 21, 1986 report of an inspection of Permit No. 667M049. And the appeal docketed at 86-102-W relates to reports of inspections of both permit areas conducted on February 7, 1986. These six appeals are, in turn, related to Bell Coal Company v. DER, EHB Docket No. 85-257-M (Opinion and Order issued April 28, 1986), an appeal which was dismissed as untimely filed.

The Department, in a letter dated April 14, 1986, requested that the Board dismiss these six appeals because the Department actions at issue are inspection reports which are not final actions of the Department and, therefore, not reviewable by the Board. The Department also suggested that the Board's ruling at Docket No. 85-257-M was dispositive of these appeals. The Board informed Bell Coal Company of the Department's request and advised it that it must file any response or objections to the Department's request by May 6, 1986. Bell Coal Company filed its response on May 5, 1986. For the reasons set forth below, the appeals docketed at 85-516-W, 85-524-W, 86-026-W, and 86-102-W are dismissed.

The appeals docketed at 85-516-W, 85-524-W, 86-026-W, and 86-102-W clearly relate to inspection reports prepared by the Department. Applying the Commonwealth Court's precedent in Sunbeam Coal Corp. v. DER, 8 Pa.Cmwlth 622, 304 A.2d 169 (1973) and our own in Perry Brothers Coal Company v. DER, 1982 EHB 501, and Reitz Coal Company v. DER, 1984 EHB 793, we find the

inspection reports to be non-appealable actions and dismiss Docket Nos. 85-516-W, 85-524-W, 86-026-W, and 86-102-W.

However, the Department actions at issue in Docket Nos. 86-027-W and 86-101-W are compliance orders, which are appealable actions. Consequently, we will deny the Department's request to dismiss Docket Nos. 86-027-W and 86-101-W. In its letter requesting dismissal of these six appeals the Department stated, as part of a request to the Board to rule on the pending motion to dismiss in 85-257-M, that "A ruling on this issue should be dispositive of the current appeals before this Board." The appeal dismissed as untimely at Docket No. 85-257-M related to a May 17, 1985 cessation order issued to Bell Coal Company. We cannot determine from the face of the compliance orders appeals at Docket Nos. 86-027-W and 86-101-W whether our April 28, 1986 Opinion and Order at Docket No. 85-257-M would be dispositive of them. The compliance order appealed at Docket No. 86-101-W refers to the compliance order appealed at Docket No. 86-027-W which, in turn, refers to a violation of a regulation rather than a violation of a prior order. The Department is seeking dismissals of these two appeals and has the burden of demonstrating to the Board why dismissal is appropriate. At this time we can only speculate why our April 28 Order provides a basis for dismissal of Docket Nos. 86-027-W and 86-101-W. The Department, however, is free to renew its motion to dismiss these two appeals.

ORDER

AND NOW, this 8th day of August, 1986, it is ordered that the Department's request to dismiss the appeals docketed at 85-516-W, 85-524-W, 86-026-W, and 86-102-W is granted and the Department's request to dismiss the appeals docketed at 86-027-W and 86-101-W is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

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WILLIAM A. ROTH, MEMBER

DATED: August 8, 1986

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LOWER PROVIDENCE TOWNSHIP	:	
	:	
	:	
V.	:	Docket No. 85-239-G
	:	and 85-371-G
COMMONWEALTH OF PENNSYLVANIA,	:	Issued: August 8, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and COUNTY OF MONTGOMERY, Permittee		

OPINION AND ORDER

Synopsis

Under 25 Pa. Code §91.31, DER may not issue an NPDES permit for discharge from an on-site sewage treatment plant, nor issue a sewerage permit for construction of the plant, until this Appellant, a municipality within whose confines the proposed plant is located, has revised its Official Sewage Facilities Plan to accommodate the proposed plant. This ruling is not modified by the fact that DER has issued an as yet unobeyed order to Appellant to appropriately revise its plan to accommodate the proposed plant, or by the fact that this Board has dismissed Appellant's appeal of DER's plan revision order to Appellant. Therefore these appeals of the above-described permits must be sustained. Although the circumstances appear to warrant equitable relief against Appellant in favor of the County which received the now overturned permits, this Board does not have the power to grant such relief.

OPINION

A. Introduction

On May 13, 1986 we issued on Opinion and Order at the above-captioned docket numbers (under the leading Docket No. 84-338-G), concerning a petition for supersedeas filed by Lower Providence Township ("Appellant") in the above-captioned and related appeals. That Opinion and Order, to which the reader can refer, described the actions appealed from in the instant appeals; therefore, we will not recapitulate those descriptions in the instant Opinion, except as seems necessary to make this Opinion conveniently readable.

Our May 13, 1986 Opinion and Order granted supersedeas in the instant appeals "pending an adjudication of the appeal at 84-338-G," after which adjudication, we wrote, "reconsideration of the supersedeases at 85-239-G and 85-371-G may be appropriate." The adjudication of the 84-338-G appeal now has been issued (August 7, 1986). In the meantime, Appellant has moved for summary judgment in the instant 85-239-G and 85-371-G appeals. The County of Montgomery ("County") has responded to this motion; the response included New Matter to which Appellant has responded. The motion for summary judgment is ripe, therefore, and we proceed to rule on it.

At Docket No. 84-338-G, Appellant appealed DER's order to Appellant to revise Appellant's Official Sewage Facilities Plan ("Plan") to accommodate County's proposed on-site sewage treatment plant, on land County owns in Lower Providence Township; the on-site plant was intended to treat sewage generated in a prison County was building on its land. Our recent (August 7, 1986) adjudication has dismissed this 84-338-G appeal on the merits. Long before the Board acted on the 84-338-G appeal, however, DER granted County an NPDES permit to discharge from the on-site plant; Appellant has appealed this NPDES permit, at Docket No. 85-239-G. Thereafter, also before the Board

acton on the 84-338-G appeal, DER issued a sewerage permit to County for construction of the on-site plant; Appellant, at Docket No. 85-371-G, has appealed this sewerage permit.

DER granted the NPDES permit under the authority of §202 of the Clean Streams Law. ("CSL"), 35 P.S. §691.202, as amended; the sewerage permit was granted under §207 of the CSL, 35 P.S. §691.207. Our May 13, 1986 Opinion rested on our determination that, despite DER's claimed authority under the CSL, the permits actually had been issued in violation of applicable regulations, notably 25 Pa. Code §91.31, which (we decided on May 13, 1986) requires issued NPDES and sewerage permits to be in conformity with the existing Plan for the municipality wherein the permits are granted. Although the issued permits undoubtedly were in conformity with DER's expectations concerning the revised Plan, the Plan had not been revised when DER issued the permits, and still has not been revised.

The essence of our May 13, 1986 Opinion, therefore, was that until the Plan actually was revised, DER did not have the authority to issue NPDES or sewerage permits that conformed only with the anticipated revision of the Plan, but not with the existing Plan.

The sole substantive basis for Appellant's motion for summary judgment is the just-stated line of reasoning of our May 13, 1986 Opinion. The sole substantive basis for County's denial that summary judgment is warranted is County's rejection of that line of reasoning. Consequently the sole issue before us at this juncture is whether, on reflection, we will affirm the aforesaid line of reasoning. More specifically, the key questions appear to be as follows:

> 1. Do the regulations, notably 25 Pa. Code §91.31, require that NPDES or sewerage permits conform to the existing Plan at the time of permit issuance?

2. Even if the answer to the above question generally is "Yes," can DER lawfully issue an NPDES or sewerage permit that does not conform to the existing Plan, but that will conform to provisions DER has ordered a municipality (in this case, this Appellant) to incorporate into a revised Plan?

3. Even if the answer to the above question generally is "No," would the issuance have been lawful if DER had withheld permit issuance until after this Board dismissed the municipality's appeal of DER's order for Plan revision?

B. Established Necessary Facts

Before proceeding to answer these key questions, we note the following. Paragraph 1 of Appellant's motion for summary judgment states:

> The record reveals and by Order of May 13, 1986 the Environmental Hearing Board found that:
>
> a. Appellant's official sewerage facility plan has not been revised to permit the proposed interim sewage treatment facility.
>
> b. The proposed interim sewerage treatment facility would not be consistent with the existing official plan of appellant.

In order that Appellant's motion for summary judgment have any possibility of being granted, the allegations 1a and 1b must be considered established, as our discussion, supra, already has indicated. However, the motion for summary judgment does not point specifically to the portion of the record in this appeal which "reveals" the truth of the allegations 1a and 1b; also, the summary judgment motion is unaccompanied by any affidavits which, under Pa. Rules of Civil Procedure Rule 1035, could be interpreted as showing that there is no genuine issue as to the truth of the allegations 1a and 1b. Furthermore, as County's answer to the motion for summary judgment appears to be arguing, the Board's Opinion and Order of May 13, 1986 cannot legitimately be read as establishing the allegations 1a and 1b. In that May 13, 1986 Opinion we did write:

> Nowhere in the record or the various pleadings of these matters is it indicated that Appellant's official plan has actually been revised. It is equally clear that the proposed interim sewerage treatment facility would not be consistent with the existing plan.

But the May 13, 1986 Opinion and Order was interlocutory only, and was signed by only a single Board member (Edward Gerjuoy). As such, the above-quoted statement from the May 13, 1986 Opinion hardly can be regarded as constituting fully adjudicated Findings of Fact, binding on this Board for the purposes of ruling on a motion which, if granted, would sustain the above-captioned appeals.

On the other hand, County's response to Appellant's motion for summary judgment did not unequivocally deny the truth of the aforesaid allegations 1a and 1b. Instead, in reference to these allegations, County wrote as follows:

> 24. The Honorable Edward Gerjuoy erred in his statement contained in his opinion accompanying the Order of May 13, 1986, that "nowhere in the record or the various pleadings of these matters is it indicated that Appellant's official plan had actually been revised."
>
> 25. On the contrary thereto, the official order of DER directing the Township to revise its official plan (subject to appeal EHB 84-338-G) effectively revised the said plan to allow County to construct a private sewage treatment facility on its 140 acres tract and the order was directory to Township to do so, the Township having no discretion in the matter.
>
> 26. Since the Township in its appeal from said order to revise its plan (EHB #84-338-G) had not petitioned the Board for a supersedeas which would have suspended the said order, the plan had been revised by DER and DER therefore had authority to issue permit to discharge effluent into the creek

and issue permit to construct the private sewage treatment facility for the prison.

27. Contrary to Board Member Edward Gerjuoy's statement in his said opinion that "it is equally clear that this proposed treatment plant would not be consistent with the existing plan," the same was consistent therewith, since the plan had been effectively revised by DER's order to Township to revise the same, and this order had not been stayed or suspended by the grant of a supersedeas in Township's appeal to the Board therefrom.

We take these just-quoted paragraphs 24-27 to be admissions by County that the previously-stated allegations 1a and 1b are true, with the County's added proviso that DER's order could be regarded as legally equivalent to actual Plan revision by Appellant; but this proviso is pure argument by County, however, and in no way alters County's admissions of the truth of the allegations 1a and 1b.

Therefore, despite the above-described irregularities in Appellant's motion for summary judgment, we find that the foregoing allegations 1a and 1b have been established for the purposes of that motion. Thus we now can go on to the key questions 1-3 formulated supra.

C. Key Questions at Issue

Neither CSL §202 or CSL §207 requires that permits to discharge treated sewage or to construct sewage treatment plants conform to an existing Plan. However, 25 Pa. Code §91.31, issued under the authority of §5 of the CSL, 35 P.S. §691.1, states:

> **§91.31. Comprehensive water quality management.**
>
> (a) The Department will not approve a project requiring such approval under the act or the provisions of this article unless the project is included in and conforms with a comprehensive program of water quality management and pollution control provided, however, that the Department may approve a project which is not included in a comprehensive program of water quality management and pollution control if the Department finds that such a project is necessary and

appropriate to abate existing pollution or health hazards and that such a project will not preclude the development or implementation of the comprehensive program.

(b) The determination of whether a project is included in and conforms to a comprehensive program of water quality management and pollution control shall be based on the following standards:

(1) Appropriate comprehensive water quality management plans approved by the Department.

(2) Official Plans for Sewage Systems which are required by Chapter 71 (relating to administration of Sewage Facilities Act).

(3) In cases where a comprehensive program of water quality management and pollution control is inadequate or nonexistent and a project is necessary to abate existing pollution or health hazards, the best mix of all the following:

(i) Expeditious action to abate pollution and health hazards.

(ii) Consistency with long-range development.

(iii) Economy should be considered in the evaluation of alternatives and in justifying proposals.

25 Pa. Code §91.1 defines the CSL to be the "act" mentioned in the just-quoted §91.31(a). CSL §202 requires a permit from DER for any sewage discharge; CSL §207 requires a permit from DER for construction of any sewage treatment facility. Therefore, the instant permits appealed-from, namely the NPDES permit and the on-site plant construction permit, were for projects requiring approval under the CSL. County has not shown or even argued that either of these projects falls under the exception stated in the latter portion of §91.31(a), as "a project necessary and appropriate to abate existing pollution or health hazards." It follows that under §91.31(a) DER should not have granted either appealed-from permit unless the permitted project conformed with "a comprehensive program of water quality management and pollution control."

§91.31(b) states the criteria for determining whether a project conforms to a comprehensive program of water quality management and pollution

control. The criteria under §91.31(b)(3) pertain only when a project is necessary to abate existing pollution or health hazards; this circumstance does not apply to the instant motion for summary judgment, as just explained. Under §91.31(b)(3), DER is instructed to balance various Sections; no balancing instruction is given in connection with §§91.31(b)(1) or (b)(2). We infer that under §91.31(b) the appealed-from permits should not have been issued unless they conformed to Appellant's existing Plan and to the pertinent approved comprehensive water quality management plan for the area. County has given us no arguments in favor of construing §91.31(b) as requiring a balancing of the standards (b)(1) and (b)(2); County has given us no reason to believe that the permits at issue were consistent with a comprehensive water quality management plan for the area. Furthermore, even if §91.31(b) were construed as requiring balancing of the standards (b)(1) and (b)(2), and even if the record were to show that the permits were consistent with a comprehensive water quality management plan, for the permits at issue, involving a sewage treatment plant, the failure to conform to an Official Plan for Sewage Systems [standard (b)(2)] surely must be given much greater weight than the happenstance that there is consistency with the water quality management plan.

For all the just-mentioned reasons, we must conclude that the answer to the above-stated key question 1 is "Yes," at least for the permits which are the subject of this Opinion. In other words, unless key questions 2 or 3 also should be answered "Yes" under the facts of these appeals, we must conclude that DER's issuance of the permits appealed-from at 85-239-G and 85-371-G was in violation of 25 Pa. Code §91.31.

Although County argues to the contrary, we see nothing in the statutes or regulations to suggest that DER's order to Appellant to revise its Plan,

or this Board's dismissal of Appellant's appeal of that order, can modify the reasoning in the previous paragraph. 25 Pa. Code §71.17 authorizes DER to order Appellant to revise its Plan; nowhere is there a statute or regulation authorizing DER to do the revision if a municipality like this Appellant refuses to obey DER's order. Similarly, nowhere is there a statute or regulation authorizing revision of Appellant's Plan by DER or this Board after this Board has rejected Appellant's appeal of DER's order. Section 10 of the Sewage Facilities Act ("SFA"), 35 P.S. §750.10, clearly gives DER the power to order municipalities to submit official plans and versions thereto, but equally clearly refrains from giving DER the authority to supersede the municipality and itself revise the official plan.

In sum, the key questions 2 and 3 supra must be answered "No" in general and under the facts of this appeal. Therefore, DER's issuance of the appealed-from permits at the time was unlawful, and the permits remain unlawful now, even after we have dismissed the appeal at 84-338-G. In other words, issuance of the permits was an abuse of DER's discretion at the time, and their reissuance now still would be an abuse of DER's discretion, because DER must obey its governing regulations. East Pennsboro Township Authority v. DER, 18 Cmwlth Ct. 58, 334 A.2d 798 (1975). Our reasoning in our May 13, 1986 Opinion and Order is affirmed. Appellants are granted summary judgment in the above-captioned appeals docket numbers. The appeals at these docket numbers are sustained. We stress that in so ruling we have drawn no conclusions as to whether operation of the on-site treatment plant will cause environmental degradation (e.g., of neighboring residential water wells) as Appellant contends. For such issues, our sustaining of the above-captioned appeals carries no preclusive effect.

Before closing, we feel compelled to add the following remarks.

Although we have no doubt that our sustaining of these appeals is legally compelled, we are not pleased with the result. Our adjudication of the appeal at 84-338-G has concluded that Appellant had and has no meritorious basis for refusing to revise its Plan to accommodate County's on-site plant. DER, presumably in the belief that its Plan revision order would be obeyed, granted NPDES and sewerage permits for County's proposed treatment plant. On the strength of these permits County, apparently in the good faith belief that the permits were valid, actually constructed the treatment plant as well as other prison facilities. Our sustaining of these appeals means that County cannot lawfully treat sewage at its on-site plant until the permits become lawful by virtue of Appellant's actual execution of the ordered Plan revision. DER, by having failed thus far to institute legal proceedings against Appellant under 35 P.S. §750.12(b), to enforce its order for Plan revision, has indefinitely delayed the time of Appellant's compliance with DER's order, a compliance which we are certain is inevitable because Appellant has no legally meritorious basis for refusing to comply. Moreover, even after Appellant finally does comply, and the NPDES and sewerage permits are legitimately reissued insofar as 25 Pa. Code §91.31 is concerned, a final decision on the lawfulness of the permits surely will be further delayed because the above-captioned appeals undoubtedly will be reinstated and will have to be heard since, as explained above, we have not reached the merits of environmental issues that may be pertinent to those permits. The circumstances cry out for equitable relief, and possibly also damages, in favor of County against Appellant. Unfortunately, we are not a court of equity and cannot grant equitable relief beyond our charter under 71 P.S. §510-21.

Board Chairman Maxine Woelfling has recused herself from any consideration of these appeals.

ORDER

WHEREFORE, this 8th day of August, 1986, Appellant's motion for summary judgment is granted and the above-captioned appeals are sustained. This ruling carries no preclusive effect whatsoever for factual or legal issues bearing on claims that operation of the on-site treatment plant which is the subject of these appeals will cause environmental degradation.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, MEMBER

WILLIAM A. ROTH, MEMBER

cc: Bureau of Litigation

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DATED: August 8, 1986
nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
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CONSOLIDATION COAL COMPANY	:	
	:	
v.	:	Docket Nos. 84-243-G
	:	85-220-G
COMMONWEALTH OF PENNSYLVANIA	:	86-193-G
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and GEORGE ENTERPRISES, INC. and	:	
INTERSTATE DRILLING, INC.,	:	
Permittee/Intervenors	:	Issued: August 8, 1986

OPINION AND ORDER

Synopsis

The Board, acting within its discretion, refuses to withdraw an appeal wherein the request to withdraw is received from the appellant only a few days before an already prepared adjudication is about to be issued; the appeal involved extensive hearings, and the Board expects the adjudication to be useful precedent.

OPINION

On July 25, 1986, the Board received a letter from Consol reading in total as follows:

> Enclosed is a Withdrawal of Notice of Appeal filed on behalf of the appellant in each of the above cases.

As of July 25, 1986, the status of the above-captioned appeals was as follows.

86-193-G. The parties still were engaged in discovery. The Board, seeing no reason to do otherwise, has issued an order of withdrawal, as per Consol's request.

85-220-G. This appeal already had been dismissed in an Opinion and Order issued July 23, 1986. Therefore the Board has taken no action on Consol's request to withdraw this appeal.

84-243-G. The Board had completed a very lengthy adjudication of this appeal, which had involved five days of hearings, including a hearing on a petition for supersedeas, extending over a period from February 15, 1985 to January 28, 1986. The adjudication was being typed when the above withdrawal request was received. The Board has decided to deny withdrawal, and therefore to permit the written and almost typed adjudication to be issued. This Opinion is concerned with the Board's reasons for so deciding.

There is no doubt that normally the Board routinely grants an appellant's request to withdraw an appeal, as we have done in the case of the appeal at 86-193-G. The standards for our allowing

withdrawal are not specified by our rules and regulations, 25 Pa.Code Chapter 21. The General Rules of Administrative Practice and Procedure, 1 Pa.Code Chapters 31, 33 and 35, also govern our proceedings, however, where not specifically superseded by 25 Pa.Code Chapter 21. 1 Pa.Code §35.51 allows routine withdrawals of pleadings (which include appellant's Notice of Appeal according to 1 Pa.Code §31.3) which are filed before a hearing has been convened. Withdrawal of a pleading after a hearing has been convened is not possible "without express permission of the agency."

On this basis, withdrawal of the 84-243-G appeal at this stage of these proceedings is a matter within our discretion. We believe our adjudication at 84-243-G will be useful precedent to other parties concerned with the main issue in 84-243-G, namely the standard by which to decide whether a proposed set of wells to be drilled through a coal mine will unduly interfere with or endanger that mine. Thus we see much reason to retain the appeal on our docket until the adjudication is issued, as it momentarily should be. Our conclusion, that we may refuse to withdraw the appeal after hearings have been completed, is consistent with the Pennsylvania Rules of Civil Procedure Rule 230(b), which: (1) denies a plaintiff the right to voluntarily terminate an action without leave of court, once the plaintiff has rested its case-in-chief; and (2) wholly forbids voluntary withdrawal of an action after the close of all the evidence.

Although not strictly necessary, because the Order which

follows is interlocutory, the Board has deemed it advisable to have the Order approved by a majority of the Board.

O R D E R

WHEREFORE, Consol's request to withdraw the appeal at 84-243-G is denied; the appeal at 86-193-G already has been withdrawn; the appeal at 85-220-G already has been dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 8, 1986

cc: **Bureau of Litigation**
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CONSOLIDATION COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-243-G**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 11, 1986
	:	
and	:	
	:	
GEORGE ENTERPRISES, INC., Permittee	:	

ADJUDICATION

By Edward Gerjuoy, Member

SYLLABUS

The mine operator's appeal of DER's issuance of four permits to a gas well driller is dismissed. Pursuant to the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. §2101 et seq., it would be an abuse of discretion for DER to issue a permit for a well if the well, when drilled, would unduly interfere with or endanger the mine. A well unduly interferes with or endangers a mine if it is not located at the point where it will produce the "least significant effect" upon the mine.

The mine operator bears the entire burden of proof in an appeal of a well driller's permit, pursuant to 25 Pa.Code §21.101(c)(3). 25 Pa.Code §21.101(a) does not shift the burden of persuasion, and to the extent that it provides authority for shifting the burden of production, it is irrelevant at this stage of this proceeding. The mine operator must demonstrate that there are alternative locations for the well which will have a less significant effect upon the mine. In addition, the mine operator must demonstrate that a

well could be safely drilled at those proposed alternative locations.

The permits for three of the four wells at issue herein expired by operation of law on April 18, 1985 because, under the recently enacted Oil and Gas Act, 58 P.S. §601.101 et seq., the wells for which these permits were issued were not operating wells on the effective date of the new Act.

The mine operator failed to meet its burden of proof with respect to the fourth well. In particular, the mine operator failed to demonstrate that the well could be safely drilled at the alternative location that the operator proposed.

FINDINGS OF FACT

1. The Appellant in this matter is Consolidation Coal Company ("Consol"), a corporation authorized to conduct business, including the underground mining of coal, in Pennsylvania, with its principal office at Consol Plaza, Pittsburgh, Pennsylvania 15241.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer and enforce the provisions of the Gas Operations Well-Drilling Petroleum and Coal Mining Act, formerly codified at 52 P.S. §1201 et seq. ("Gas Operations Act"), and the provisions of the Act of December 19, 1984, P.L. 1140, No. 223 ("Oil and Gas Act"), which substantially repealed the Gas Operations Act.

3. The Permittee is George Enterprises, Inc. ("the Georges"), a corporation with its principal place of business at 307 Duquesne Avenue, Morgantown, West Virginia 26505.

4. Consol owns and operates the Purseglove No. 15 mine ("the mine"), a permitted and projected underground coal mine operating in the

Pittsburgh seam in Greene County, Pennsylvania, and Monongalia County, West Virginia.

5. The Georges own a tract of land overlying the proposed workings of the mine ("the George tract").

6. The George tract is located in Perry Township, Greene County, Pennsylvania.

7. On June 26, 1984 DER issued four permits to the Georges authorizing the drilling of four gas wells.

8. Two of the permits authorized redrilling of preexisting wells. These two permits are numbers GRE-21962-D (Well 1) and GRE-21963-D (Well 2).

9. Two of the permits authorized the drilling of new wells. These two permits are numbers GRE-21964 (Well 4) and GRE-21965 (Well 5).

10. The George tract comprises between 104 and 112.7 acres. (Tr.II 174)[1]

11. DER did not review Consol's objections to the proposed well locations prior to issuing the permits to the Georges.

12. On December 19, 1984 the Oil and Gas Act was enacted, P.L. 1140, No. 223, 58 P.S. §601.101 et seq. According to its terms, permits issued under the previously effective Gas Operations Act expired unless the permitted well was an "operating well" (as defined by the Oil and Gas Act) on April 18, 1985, the effective date of that Act.

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[1] References to transcripts are as follows: Tr.SS designates the transcript of the supersedeas hearing held February 15, 1985. Tr.I designates the transcript of the first day of the hearing on the merits of this appeal, held March 6, 1985. Tr.II designates the transcript of the second day of the hearing on the merits, held March 7, 1985. Tr.III designates the transcript of the hearing conducted January 27 and 28, 1986.

Expiration of the permits issued under the Gas Operations Act

13. Prior to April 18, 1985 no drilling activities took place at Wells 1 and 2. (Tr.III 276-77)

14. As of April 18, 1985 Wells 1 and 2 had not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding twelve months.

15. Wells 1 and 2 have never been granted inactive status.

16. Prior to April 18, 1985 a short piece of pipe was placed in the ground at the site for Well 4 (the "first pipe"); this piece of pipe was about 5'10" in length. (Tr.III 56, 258, 309-10)

17. No testimony was offered concerning the manner in which the first pipe was placed in the ground at the site for Well 4.

18. On or about May 2, 1985 the first pipe at the site for Well 4 was struck by a bulldozer, crushed, and rendered useless. (Tr.III 270, 309-10)

19. After the first pipe was damaged, it was placed back in the ground with a bulldozer blade for the purpose of marking its location before being struck by the bulldozer. (Tr.III 308-09)

20. It is likely that the first pipe originally had been placed in the ground by hand or with the use of a bulldozer blade. (Tr.III 127)

21. Before drilling activities can begin at a site for a well, there must be access to the site for a drilling rig, a pad for the rig must be built, and a sump or pit for the cuttings must be built. (Tr.III 122)

22. The size of the pad necessary to carry out drilling operations depends on the size of the rig used. (Tr.III 147)

23. There had been some excavation done at the location for Well 4 prior to April 18, 1985. (Tr.III 25)

24. Cuttings are generated by drilling activities; the absence of cuttings is an indication that no drilling has occurred. (Tr.III 42, 133, 155)

25. As of April 12, 1985 there was no indication that any drilling had taken place at the location for Well 4. (Tr.III 25, 31-2, 37)

26. There was no change in the condition of the location for Well 4 between April 12, 1985 and April 25, 1985. (Tr.III 38)

27. As of May 16, 1985 there was no indication of any drilling activities having taken place at the location for Well 4; i.e., there were no cuttings and no sump was present. (Tr.III 63)

28. A sump was first constructed at the location for Well 4 sometime during June of 1985. (Tr.III 25, 42, 44-5, 99, 232)

29. During June of 1985 the location for Well 4 was enlarged and the access road to the site was widened. (Tr.III 44-5, 66)

30. On June 18, 1985 a conductor pipe was placed in the ground at the location for Well 4; this pipe was placed to a depth of approximately 30 feet. (Tr.III 285, 307)

31. The first piece of pipe placed in the ground at the location for Well 4 was not drilled into the ground. No drilling activity took place at the location for Well 4 prior to April 18, 1985.

Alternate locations for Well 5

32. Consol has proposed an alternate location for Well 5 which it contends would not affect the health or safety of the miners working in the mine and which would not interfere with the mine's operation. (Tr.SS 69, 81)

33. In an effort to determine whether its proposed alternative location for Well 5 would be acceptable from the standpoint of surface topography, i.e., a location where a well could be safely drilled, Consol

conducted an aerial survey of the George tract, by flying over it in a helicopter. (Tr.I 204)

34. Based upon this aerial survey, Consol believes that the permitted location for George Well 5 presents problems concerning the ability to safely drill a well, due to the potential for landslides. (Tr.I 211-13)

35. Mr. Hemple, the Georges' expert, does not believe that there is a potential for landslides at the permitted location for George Well 5. (Tr.II 140)

36. Consol proposed relocation of George Well 5 to a site designated "A" where it would penetrate the gate entry designated 6-West at the southeastern corner of the George tract. (Tr.I 283; Consol Ex.2, point "A")

37. Based upon its aerial survey of the George tract, Consol believes that its proposed relocation site "A" for George Well 5 would be suitable for well-drilling from the standpoint of surface topography. (Tr.I 208-210)

38. It is not possible to safely drill a well at proposed site "A". (Board Ex.1A)

39. It also is not possible to safely drill a well within fifty feet of proposed site "A". (Board Ex.1A)

40. Consol proposed another alternative well location penetrating gate entry 6-West to the west of proposed site "A". This other proposed location is shown as site "B" on Consol Ex. 2. Tr.I 209; Consol Ex.2)

41. Based upon its aerial survey of the George tract, Consol believes that site "B" as well as any location along a line between A and B would be acceptable for drilling a well from the standpoint of surface topography. (Tr.I 208-210)

42. It is possible to safely drill a well at site "B". (Board Ex.1A)

43. Consol also proposed relocation of wells to any point penetrating a barrier separating the Consol mine from the so-called "Humphrey Mine" located to the north of the area to be mined by Consol. The barrier is immediately adjacent to and north of gate entry 8-West. (Tr.I 230; Consol Ex.2)

44. Based upon its aerial survey of the George tract, Consol believes that, from the standpoint of surface topography, there are many suitable alternative well sites on the portion of the George tract overlying the barrier described in the immediately preceding finding of fact. (Tr.II 108; Consol Ex.2)

45. The alternate well sites proposed by Consol are only approximate locations. No survey was done prior to offering these as alternative sites. (Tr.I 279-82; Tr.II 100)

46. It is not possible to accurately determine the degree of slope present in a given area simply by making an aerial survey of the area of the type conducted by Consol. (Tr.I 321; Tr.II 141)

DISCUSSION

Procedural Background

This is an appeal by Consolidation Coal ("Consol") of four permits issued by the Pennsylvania Department of Environmental Resources ("DER") to George Enterprises, Inc. ("the Georges"). The procedural history of this appeal is somewhat complex. The permits were issued in June of 1984. Shortly after their issuance, Consol filed the instant appeal, objecting to the well locations on the basis that they would penetrate the proposed

workings of one of its deep coal mines. The normal procedure for raising such objections was set forth in the then-effective Gas Operations Well-Drilling Petroleum and Coal Mining Act, sections 2201 and 2202 ("Gas Operations Act"). Under that Act the applicant for a well permit was to forward a copy of a map indicating the well locations to DER; DER, in turn, was directed to forward the map to each coal operator working a seam of coal which could be penetrated by the well. If no objections to the well locations were raised by the coal operator within ten days of receipt of this notice, DER was to "forthwith issue a drilling permit." In the present case, however, the objections raised by Consol were not considered by DER prior to issuance of the George permits, for reasons which have not been explored in this proceeding.[2]

The Georges filed a Motion to Dismiss the appeal in late July, 1984, arguing that Consol's failure to timely file objections with DER constituted a waiver of its right to appeal the permits' issuance. In an Opinion and Order of October 2, 1984, at this docket number, the Board denied this Motion, ruling that even if it were assumed for the purpose of argument that Consol had failed to timely file its objections, this would not affect Consol's right to appeal under the provisions of 71 P.S. §510.21(c).

After the parties had filed their pre-hearing memoranda a

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[2] Consol's objections may have been delivered to a vacated DER office and this may have been a reason that they were not considered prior to the permit issuance. During the hearings on this matter the Board ruled that--in view of the time constraints (see infra)--it would not take evidence on this so-called "timeliness" issue unless the Board's final decision were appealed to the Commonwealth Court. (Tr.I 13) This ruling is herewith affirmed, with the obvious and originally intended proviso that evidence on this issue will not be taken unless such timeliness is going to be a question before the Commonwealth Court. The parties are reminded that, if the record is to be reopened for the purpose of taking evidence on timeliness, a timely petition for reconsideration and reopening must be filed with the Board.

conference call was conducted by the presiding Board member; it was agreed that DER would arrange an informal conference among the parties wherein Consol would be given an opportunity to present its objections to the permitted well locations. In addition, it was agreed that the Georges would provide notice of intent to drill any of the four wells at least two weeks prior to actual commencement of drilling and, in any event, would not drill any of the wells prior to the aforementioned informal conference.

The informal conference was held on January 31, 1985. The information presented during the conference did not persuade DER to change its original decision to issue the permits at their proposed locations. Consequently, shortly after the conference was held, the Georges gave notice of their intention to drill the four wells.

This notice of intent to drill precipitated Consol's filing of a Petition for Supersedeas of the instant permits, on February 8, 1985. A hearing on the petition was conducted on February 15, 1985.[3] On February 19, 1985 a supersedeas was issued for limited periods with regard to each of the four wells. This supersedeas has since expired.

An accelerated hearing on the merits of this appeal was conducted on March 6 and 7, 1985. The need for an accelerated hearing was created by the passage, on December 19, 1984, of the Oil and Gas Act (P.L. 1140, No. 223), which repealed, in large measure, the Gas Operations Act. The Oil and Gas Act provides that certain permits issued under the Gas Operations Act will remain effective under the new Act. However, since it was possible that a determination of the permits' continued effectiveness might depend upon

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[3] By Order of February 19, 1985, confirming an agreement among the parties, it was determined that the record made during the supersedeas hearing would be treated as a portion of the hearing of the merits of this appeal. See footnote 1 supra, concerning designation of transcript references.

whether the permitted wells were drilled before the new Act became effective (on April 18, 1985), the Georges requested that the Board hear the evidence in this matter and render a decision as soon as possible, preferably sufficiently prior to April 18, 1985 to allow drilling of the wells. Accordingly, on March 28, 1985 the Board issued a provisional ruling on the merits, relying in part upon a determination by DER, made after the close of the accelerated hearing, that certain alternative well locations would be acceptable from the standpoint of drilling safety. The Board gave the parties an opportunity to object to admission of the DER letter summarizing the aforesaid determination (and the attached documents) as a Board exhibit. No objections were raised; consequently, the Board considers this letter and the attached documents now to be a part of the record of this appeal.[4]

The Board's provisional ruling dismissed Consol's appeal on the merits, insofar as Wells 1, 2 and 5 were concerned, but sustained Consol's appeal insofar as Well 4 was concerned; the Board directed that Well 4 was to be relocated to the alternative location "B" identified as Board Ex.1A. The Board's Order of March 28, 1985, embodying these rulings, explicitly stated that the rulings were provisional pending issuance of the Board's final adjudication after the Board's review of the hearing transcripts and briefs. On April 22, 1985, however, before the Board's final adjudication had been prepared (indeed, before any post-hearing briefs had been filed), Consol filed with the Board a "suggestion of mootness," arguing that this appeal had become moot as to Wells 1, 2 and 4 by virtue of the alleged fact that the Georges had not drilled these three wells prior to the effective date of the

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[4] The DER letter has been designated Board Exhibit 1A, the attached plat by Richard S. DiPretoro, LLS, Board Exhibit 1B, and the attached map prepared by Consol, Board Exhibit 1C.

Oil and Gas Act. Thus, Consol argued, the permits for Wells 1, 2 and 4 had expired by operation of law and there no longer was any relief as to those three wells which the Board could grant in this appeal. On January 27 and 28, 1986 the Board heard testimony on, inter alia, the issue of whether--prior to the effective date of the new Act--the Georges had undertaken activities at the permitted locations for the three wells which were sufficient to preclude the lapse of the permits by operation of law.

Mootness

As stated above, the Oil and Gas Act, 58 P.S. §601.101 et seq., became effective April 18, 1985. Section 201 of the Act governs well permits generally and provides that "no person shall drill a well or alter any existing well . . . without having first obtained a well permit" pursuant to the provisions of the Act. 58 P.S. §601.201(a). Taken alone, this provision would preclude persons (such as the Georges) holding permits issued under the previously effective Gas Operations Act from drilling or altering their wells unless they first applied for and received a new permit, pursuant to the Oil and Gas Act, from DER. The Oil and Gas Act, however, contains a provision addressing the continuing effectiveness of permits issued under the previous Act. Section 201(i) reads in pertinent part as follows:

> Any drilling permit issued prior to the effective date of this act for a well which is an operating well on said date shall remain in force as a well permit until the well is plugged in accordance with section 210 [of the Oil and Gas Act]. 58 P.S. §601.201(i).

The Act defines "operating well" as "any well not plugged and abandoned." 58 P.S. §601.103. In addition, the Act defines the term "well":

> "Well." A bore hole drilled or being drilled for the purpose of or to be used for producing, extracting or injecting

> any gas, petroleum or other liquid related to oil or gas production or storage, including brine disposal, but excluding bore holes drilled to produce potable water as such.
> 58 P.S. §601.103.

The critical element in the foregoing definition of a "well" is the emphasis upon drilling. That is, before operations can be said to have created a well, a bore hole either must be present or in the process of being drilled. Absent actual drilling, no well can be said to exist for the purposes of the Oil and Gas Act.

It is on the basis of this definition of a "well" that we conclude that the Georges' permit for Well 4 expired by operation of law on April 18, 1985. The evidence presented during the hearings in January, 1986 established that no drilling took place at the permitted location for Well 4 prior to that date. Consol presented considerable unrebutted evidence that there was no indication of any drilling activity at the site prior to April 18, 1985. The Georges offered testimony which established that certain actions preliminary to actual drilling operations took place prior to April 18 (e.g., widening of access roads), but no testimony was offered to rebut the statements by Consol witnesses that no drilling had occurred. Although there was a pipe in place at the permitted location for Well 4 at least as early as the first week of April, 1985, by all indications no drilling activity accompanied the placement of this pipe. Moreover, this pipe was removed in June of 1985 and replaced with an actual conductor pipe. Drilling activities did accompany the placement of the second pipe. We conclude that the first drilling at the site for Well 4 took place in June, 1985.

In light of these facts, we hold that no well, as defined by the Oil and Gas Act, existed at the permitted location for Well 4 prior to April

18, 1985. Therefore, there was no operating well in existence on that date at that location and the provisions of section 201(i) of the Oil and Gas Act cannot operate to prevent the expiration of the Georges' permit for Well 4.

Resolution of the issue of whether Wells 1 and 2 have expired likewise is governed by the definitions provided in the Oil and Gas Act. Again, in order for a preexisting well permit to remain in effect the well must have been an operating well on the effective date of the Act. Since the permits for Wells 1 and 2 are permits to deepen preexisting wells which were drilled at some earlier date, we are not here faced with the problem associated with the permit for Well 4, supra. Wells 1 and 2 clearly are "wells" within the meaning of the Oil and Gas Act. The issue is whether they could be considered "operating wells" as of April 18, 1985.

An operating well is "any well not plugged and abandoned." The Act defines "abandoned well" as:

> Any well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months, or any well for which the equipment necessary for production, extraction or injection has been removed, or any well, considered dry, not equipped for production within 60 days after drilling or deepening, except that it shall not include any well granted inactive status.
> 58 P.S. §601.103

The Act does not define the term "plugged" per se, although section 210 sets forth extensive requirements concerning plugging. 58 P.S. §601.210.

Upon examination it is apparent that the Act's definition of "operating well" contains a logical inconsistency. The plain language of the statute states that in order to be considered "operating", a well must not be plugged and not abandoned. Use of the conjunctive "and" suggests that both

requirements must be met. If this were in fact what the legislature intended, however, an absurd result ensues. A well could be abandoned (within the meaning given that term under the Act) but so long as it were not also plugged, it would be considered an operating well. We hold that this could not have been the intent of the legislature. Common sense tells us that a well cannot be both operating and abandoned. Pursuant to the Statutory Construction Act, 1 Pa. C.S.A. §1922, we are entitled to presume that the legislature did not intend a result that is absurd or unreasonable. Therefore, we conclude that a well which is either plugged or abandoned is not to be considered an operating well. In other words, we conclude that the legislature actually intended to employ the term "or" rather than "and" in its definition of operating well.

Given the foregoing, we conclude that Wells 1 and 2 cannot be considered "operating wells" as of April 18, 1985 because as of that date the wells fell within the definition of "abandoned wells", i.e., they had not been "used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months" and the wells had not been granted inactive status. Wells 1 and 2 were preexisting wells which had not been in use for a long period of time. There is no dispute that the Georges did not undertake any drilling activities for the purpose of deepening these two wells prior to April 18, 1985. Therefore, we conclude that as of April 18, 1985, Wells 1 and 2 were abandoned rather than operating wells. The permits for Wells 1 and 2 were not preserved by operation of section 201(i) of the Oil and Gas Act.

In general, where there is no longer any relief which can be granted because of events which have transpired while a case was pending, the case should be dismissed as moot. Chester Upland School District v. Chester Upland Education Association, 64 Pa.Cmwlth 523, 440 A.2d 1283 (1982);

Atlantic Inland, Inc. v. Township of Bensalem, 39 Pa.Cmwlth 180, 394 A.2d 1335 (1978). Consol's Notice of Appeal requested that the Board remand the four George permits to DER if the Board found that DER had abused its discretion in issuing them. Since we have held that the permits for Wells 1, 2 and 4 expired on April 18, 1985 we could not grant the relief which Consol requested. Therefore, it appears that a dismissal on grounds of mootness with regard to those three permits would be appropriate.

DER and the Georges argue that there is a well recognized exception to the mootness doctrine which is applicable here. When the issues presented in a case which is otherwise moot are of a recurring nature and are capable of repeatedly avoiding review, the case need not be dismissed. Allen v. Colautti, 53 Pa.Cmwlth 392, 417 A.2d 1303 (1980); Township of Bensalem, supra. They contend that the Board should rule on the validity of the four George permits even if the Board holds that the permits have expired, because (they argue) new permits for Wells 1, 2 and 4 have been issued by DER pursuant to the Oil and Gas Act and Consol has appealed the issuance of these permits (EHB Docket No. 86-193-G). The test by which the respective rights of the well operator and coal operator are to be balanced is the same under the Oil and Gas Act as under the Gas Operations Act, i.e., whether the wells will unduly interfere with or endanger the mine. 58 P.S. §601.202(b). Thus, it is argued, the parties will have to relitigate the facts applicable to this test in the appeal from the issuance of the new permits, and it would be appropriate for the Board to render a decision on this issue herein, even if the original permits have expired.

Despite the fact that the standard for undue interference and endangerment is the same under the two Acts, we conclude that the exception to the mootness doctrine described in Colautti and Township of Bensalem,

supra, is inapplicable here. The Oil and Gas Act imposes obligations upon DER in reviewing permit applications which differ significantly from those imposed by the previously effective Gas Operations Act. See, e.g., sections 205 and 207 of the Oil and Gas Act, 58 P.S. §§601.205 and 601.207. In an appeal from the issuance of the new permits under the new Act these issues likely will have to be addressed as well. In any event, since in fact there is an appeal filed from the issuance of those permits under the Oil and Gas Act, the Board will be deciding whether the wells, if drilled at their newly permitted locations, will unduly interfere with or endanger Consol's mine. Therefore, this is not an issue which is "avoiding review." Moreover, as Consol has suggested, the Board can incorporate those portions of the record in the instant appeal which go to the "undue interference and endangerment" test into the record of the appeal from the issuance of the new permits under the Oil and Gas Act. This would promote judicial economy and avoid the need for the parties to relitigate that issue. Unless the other parties raise meritorious objections, the Board will consider the record in the new appeal (EHB Docket No. 86-193-G) to incorporate the appropriate portions of the record from this appeal.

In sum, we hold that George permits 1, 2 and 4 expired by operation of law on April 18, 1985, and that the appeals of these permits therefore are moot.[5] Thus the remainder of this opinion deals solely with George permit 5, which the parties agree was drilled prior to April 18, 1985 and which therefore did not lapse.

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[5] For reasons discussed, supra, under the heading "Procedural Background," this holding requires us to vacate our Order of March 28, 1985, insofar as Wells 1, 2 and 4 are concerned. See the Order, infra, accompanying this adjudication.

The test to be Applied and the Burden of Proof

Since this is an appeal from the issuance of a permit brought by a third party, the burden of proof rests with the Appellant. 25 Pa.Code §21.101(c)(3). As a general matter, this means that it is Consol's burden to show that the grant of the permit was an abuse of DER's discretion. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975). This general rule, however, tells us little about Consol's specific substantive burden in the context of this particular appeal.

In order to ascertain the substantive requirements included within this assignment of the burden of proof, we must look to the statute, the Gas Operations Act, as interpreted by the Commonwealth Court in Einsig v. Pennsylvania Mines Corporation, 69 Pa.Cmwlth 351, 452 A.2d 558 (1982). In Einsig, the court overturned an EHB adjudication which had sustained a mine operator's appeal of a DER permit which allowed the well operator (Einsig) to drill a gas well through a coal seam in the mine. The nub of the Einsig opinion was its construction of the language of the Gas Operations Act, particulary the test set forth in section 2203 of the Act, 52 P.S. §2203, which governs the resolution of the conflicting interests of the well driller and the mine operator. This test provides that a well must be located where it "can be safely drilled without unduly interfering with or endangering" the mine. In addition, the statute provides that where an alteration of the originally proposed well location is required, DER shall determine a location of the tract of land "as near to the original location as possible." 52 P.S.

§2203(b).[6]

The Act itself does not define or otherwise construe the phrase "without unduly interfering or endangering." In Pennsylvania Mines v. DER, 1982 EHB 215 (the Board's adjudication of the Einsig case) the Board gave what may be termed an extrinsic construction of this phrase, holding that a proposed gas well in an operating or operable mine (i.e., a mine possessing a "workable coal seam" as defined in 52 P.S. §2102(4)) will unduly interfere with or endanger the mine if:

> As a direct result of drilling the well, in order to comply with safety or other regulations, there will become unmineable, or impractically expensive to mine, by every commonly employed mining method, including room and pillar, an amount of coal significantly (more than de minimis) greater than the amount of coal that similarly would have become unmineable, or impractically expensive to mine, had the well been drilled at least 1000 feet from any already existing wells. . .[7]
> 1982 EHB at 243.

This test relies upon an external standard, i.e., a hypothetical well drilled at least one thousand feet from the nearest adjacent well, as the starting

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[6] The statute contains a provision directing DER to first attempt to reconcile the parties' conflicting interests via a conference. As noted above, this procedure did not take place in the instant matter (possibly for the reason suggested in footnote 2) before DER issued the permits. However, as also explained supra, the conference was held before any hearings were conducted on this appeal.

[7] The 1000 foot reference in the test derives from an agreement which apparently has existed among the gas and oil industries and the coal industry within Pennsylvania, concerning an acceptable distance for well-spacing. This 1000 foot spacing criteria apparently has been incorporated into the Coal and Gas Resource Coordination Act (P.L. 1069, No. 214), 58 P.S. §§501 et seq., passed December 18, 1984 (one day before passage of the Oil and Gas Act), but not into the Oil and Gas Act. In any event, inasmuch as the cited Board test presupposes that the well at issue is an offset well (i.e., a well whose proposed drilling site is less than 1000 feet from some already existing well), the test would not have any application in this proceeding. It is cited here merely for purposes of comparison.

point for analysis.

The Einsig court rejected this extrinsic test for undue interference or endangerment. The language of the Einsig opinion makes it very clear that the court would have rejected any test which measured the well's interference or endangerment against any reasonable external standard, since such a test inevitably carries the possibility that no proposed well (on the land available to the well driller) could meet the external standard. The court clearly believed that any test which would wholly preclude the well driller from obtaining access to his rights in the oil or gas resource would amount to an unlawful taking of the well operator's property.

The Einsig court therefore formulated what may be termed an intrinsic test for undue interference or endangerment as follows:

> Once [DER] has determined that the well may be safely drilled. . .DER is empowered by the Act only to decide upon the location on the tract where the well will not unduly interfere with or endanger the mine. In a location other than that place where the effect on the mine is least significant, a well will unduly interfere with or endanger the said mine, and DER is ordered by the mandatory language of the Act to ascertain where that location is, and to issue a permit therefor. Were the well driller to drill in a position other than that chosen by the parties, or by DER in the application of its environmental expertise, he would be "unduly" interfering with or endangering the mine. (emphasis in original)
> 452 A.2d at 567

Under this Einsig test, the determination that a well is unduly interfering with or endangering a mine must be made on the basis of comparisons against other possible sites on the tract, and not against any hypothetical external standard of undue interference or endangerment. The use of the term "least significant effect" presupposes a comparison with another area of the mine

where a well might be drilled. Thus, under Einsig, in order to ascertain whether a well unduly interferes with or endangers a mine, a comparative determination is necessary to ascertain the "place where the effect on the mine is least significant." However, the Einsig opinion does not provide any criteria for determining the point of least significant effect, whether with reference to interference or to endangerment. It seems clear that there are numerous specific ways to interfere with or to endanger the mine, not all of which are relevant to these proceedings. But it is relevant to observe--and we therefore do rule--that the mine is significantly interfered with whenever the drilling of a well forces a non-trivial alteration of the mine's previously projected operational plans or practices. Similarly, a mine is significantly endangered whenever these altered operational plans or practices--forced by the drilling of a well--nontrivially increase the hazards to workmen in the mine.

For the purposes of applying the Einsig test to this appeal, the foregoing criteria suffice for comparing the significant interference or endangerment effects on the mine at different proposed locations of the well. On the other hand, under Einsig this comparison is not of itself the conclusive determinant of whether or not there will be "undue" interference with or endangerment of the mine. A proposed well location is of no interest, and its significant effects on the mine need not be studied, unless the well can be safely drilled at this proposed location. Again, the Einsig opinion does not define the meaning of "safely drilled". There is general agreement among the parties to this appeal, however, that it is meant to refer to the safety of the drilling process itself or the safety of locating a well upon a particular portion of the surface tract, and not to the safety of mine operations once the well has been drilled. We adopt this

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construction.

Under Einsig, therefore, as applied to this appeal, and recalling that the mine operator bears the burden of proof, a mine operator (such as Consol) can demonstrate that the proposed location of a well is not at the point "of least significant effect," i.e., that the proposed well location will unduly interfere with or endanger the mine, if the mine operator can show that there is at least one other location on the tract where (a) the well can be safely drilled and (b) the mine is less significantly interfered with or less significantly endangered (as these criteria have been described, supra) than at the location DER approved. The mine operator can meet its burden of proof in an appeal of an approved well location, i.e., the operator can show that DER's approval of the proposed location was an abuse of discretion, if it can show that (i) the proposed well can not be safely drilled at the location DER approved or (ii) the proposed location "is not at the point of least significant effect" (as this phrase has just been defined).

Consol has directed a substantial portion of its briefs to arguing that part or all of the burden the previous paragraph has placed on Consol should be shifted to the Georges. Consol argues that our reliance upon 25 Pa.Code §21.101(c)(3) is inappropriate, because we have not taken into account 25 Pa.Code §21.101(a) which reads:

> §21.101. Burden of proceeding and burden of proof.
> (a) In proceedings before the Board the burden of proceeding and the burden of proof shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of any issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish his case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going

> forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

Thus, Consol argues, the burden of demonstrating that there are no other locations where the well driller could reasonably exercise its rights concurrently with those of the coal operator should rest with the driller, since it is the party in possession of the relevant facts and knowledge on this issue. Alternatively, Consol argues that even if the Board will not agree that the entire burden on this issue should be shifted to the well permittee, at the very least the burden should be shifted on the issue of whether the proposed alternative well locations can be safely drilled, putting aside temporarily the issue of interference with and endangerment of the mine. We reject both of these arguments. Under §21.101(a), supra, the most the Board can do is shift the burden of going forward with the evidence. Section 21.101(a) does not permit us to shift the ultimate burden of persuasion even if the other party is in possession of the relevant facts and information, unless the burden-shifting clause, 25 Pa.Code §21.101(d), comes into play. Hepburnia Coal Company v. DER, Docket No. 85-309-G (Adjudication, May 28, 1986). 25 Pa.Code §21.101(d) is wholly irrelevant to this appeal. In short, Consol has the burden of persuasion in this appeal.

We next remark that in the instant appeal, since the hearing on the merits has been conducted, who had the burden of production now is irrelevant, unless there is reason to think the Board did not have the benefit of a full presentation of evidence on the issue of whether the proposed alternative location could be safely drilled. There is absolutely no reason to so think; evidence going to the safety of drilling wells at the alternative location proposed by Consol was very fully presented during the

hearings on this appeal. There has been no failure to produce evidence on this issue and, therefore, we are simply left with the determination of whether Consol has met its ultimate burden of persuasion on the facts as presented. As we stated above, it is Consol's burden to establish that a well can be safely drilled at any alternative proposed location and, if safe drilling can be accomplished, that the alternative location represents a point where the significant effect upon the mine is less than at the originally proposed location.

We are willing to agree, however, that the well driller is more likely to be in possession of information concerning the drilling of wells, whereas the mine operator is more likely to be familiar with the facts concerning interference with and endangerment of the mine. For this reason, if all other factors were equal (e.g., the relative qualifications of the parties' respective witnesses), we should give greater weight to the well driller's testimony on the subject of safety in drilling whereas we should give greater weight to the testimony of a mine operator concerning effects upon the mine resulting from the drilling of permitted wells. It remains the case, however, that the appellant mine operator bears the burden of proof on the issue of drilling safety; in particular, the mine operator must persuade the Board that a well can be safely drilled at a proposed alternative location, in the face of any testimony by the well driller to the contrary.

Even after all this discussion, there still remains a serious problem with application of the Einsig test to the instant appeal. Although we have decided that three of the originally granted permits have lapsed by operation of law and are no longer before us, our decision on whether the permit for Well 5 was an abuse of DER's discretion cannot ignore the fact that the permit for Well 5 was granted along with permits to drill Wells 1, 2

and 4, in response to an application by the Georges for all four well permits. Unfortunately, the Einsig test speaks only of a single proposed well and gives no guidance as to the test's application to circumstances such as those of the instant appeal, where the locations of four proposed wells originally were disputed. Indeed, if the Einsig test is to be applied at all in disputes involving more than one well (such as the instant appeal), some assumption which prevents application of the test to the wells as a single group is essential to avoid an absurd result which the Einsig court could not have intended. In particular, limiting the drilling to one well always will result in a less significant effect upon a mine than the drilling of two or more wells (because the effect on the mine always will be decreased by eliminating a well). Under a literal reading of the Einsig test, therefore, at the very outset of its deliberations on the Georges' permit applications DER could have been forced to disallow three of the wells and the Georges would have had to be content with a single well, drilled at the location where that well alone would have the least significant effect on the mine (assuming it could be safely drilled there). Moreover, under Einsig the fact that this consequence of the Einsig test would limit the Georges to a single well on a tract of 112 or so acres, and thus probably would severely restrict their ability to exploit more than a portion of the gas field, would be irrelevant to our review of DER's actions. Einsig unmistakably admonishes DER and the Board to disregard any considerations of whether the gas well driller or the coal mine operator "will be more financially harmed, or proportionately more financially harmed" by application of the Einsig test, provided the driller is not completely cut off from the oil or gas field. 452 A.2d at 567.

Although the parties were given the opportunity to brief the issue

of the test to be applied in this appeal, none of the briefs filed paid any serious attention to the difficulties, discussed supra, involved in applying the Einsig test to the group of four wells which are the subject of this appeal. In fact, only Consol even mentioned the possibility that Einsig might imply that George must drill fewer than the four wells DER has permitted. Consol's presentation of evidence at the hearing, however, as well as its post-hearing brief, concentrated on the claim that for each of the permitted George wells there was a specifically identified alternative location which would satisfy the requirements of the Gas Operations Act. In fact, identifying such an alternative location for each challenged permit does appear to be part of the mine operator's burden under our analysis, supra, of Einsig's implications. As we have stated, to demonstrate that the originally proposed well location will unduly interfere with or endanger the mine, the mine operator must show there is at least one other location on the tract where (a) the well can be safely drilled and (b) the mine is less significantly interfered with or less significantly endangered than at the location DER approved. The mere fact that the mine operator has appealed a well permit grant does not automatically impose on DER the burden of examining the entire site for points "of less significant effect" than the original permit site; it is up to the mine operator to identify specific alternative locations of the well, and to convince DER (or if DER refuses to be convinced, the Board) that at least one of these alternatives indeed is site satisfying the above-stated requirements (a) and (b).

Consol identified only a single alternative site for Well 5, namely the site designated as point "A" on Consol Exhibit 2. In view of the immediately preceding discussion, therefore, we need consider only whether DER abused its discretion by permitting Well 5 at George's originally

requested location for that well instead of at point "A". As stated earlier, shortly after the close of the March 6-7, 1985 accelerated hearing, the Board provisionally dismissed Consol's appeal with regard to Well 5. We herein affirm that provisional ruling. The discussion which follows sets forth the basis for our Well 5 decision.

The facts Concerning Well 5

Under Einsig, supra, Consol had to demonstrate that Well 5 could be safely drilled at Consol's proposed alternative location, namely site "A". Consol's attempt to meet this burden consisted of testimony from Mr. Pasini, its expert, to the effect that he had conducted an aerial survey of Consol's proposed alternative locations for all four wells from a helicopter and that, based on what he was able to observe during this survey, these alternative sites appeared suitable from the standpoint of surface topography.

It is true that Mr. Pasini's testimony was for the most part unrebutted. Nevertheless, we are not inclined to hold that such a cursory observation can suffice to establish that any of these alternative sites would be a safe place to drill a well. Particularly when the issue at hand is one involving the safety of the workmen involved in the actual drilling, some type of first hand, on-site observation is necessary in order to meet this burden.

Board Exhibit 1A demonstrates that DER considers the slope of a possible well site to be of considerable importance, since there is a possibility of collapse of the drilling structure due to earth movement if the slope is too great. Mr. Pasini himself testified that his helicopter observations did not permit him to ascertain with any degree of accuracy the slopes of the portions of the George tract which he examined. The Georges' expert, Mr. Hemple, likewise states that an aerial survey of this type would

not be sufficient to determine whether a well could be safely drilled at the proposed site.

In short, suffice it to say that Consol--insofar as Mr. Pasini's testimony is concerned--did not meet its burden of showing that any of its proposed alternative well locations were sites where a well could be drilled safely. For the same reason we reject Consol's claim that the permitted location for Well 5 was unsuitable because of the possibility of landslides. Without first hand, on-site observation of the site chosen for Well 5, we do not believe an accurate determination can be made with regard to this alleged fact.

To clarify this crucial issue of site suitability, on March 7, 1985, after the taking of testimony had been completed, the hearing examiner requested that DER conduct an on-site inspection of the George tract for the purpose, inter alia, of determining whether the proposed alternative site for Well 5 would be a safe location for drilling. The alternative location for Well 5 was designated as point "A" on Consol Exhibit 2. DER determined that a well could not be safely drilled at proposed alternate site A, and embodied this finding in a letter and attached documents which were submitted to the Board and have been incorporated into the record as Exhibits 1A-1C (see footnote 4, supra). No objections to the Board's use of this material have been raised nor has anything been offered to indicate that DER's determination was in error. Therefore, we adopt DER's finding concerning the safety of drilling at proposed alternate location A. Accordingly, the appeal must be dismissed with respect to Well 5.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter

of this appeal.

2. The Board's duty herein is to determine whether DER has abused its discretion.

3. Pursuant to §2203 of the Gas Operations Well-Drilling Petroleum and Coal Mine Act, 52 P.S. §2203, this appeal must be sustained with regard to any well where the record indicates that the well, if drilled where permitted by DER, would cause undue interference with or endangerment of the mine.

4. Undue interference or endangerment occurs if the well is not located on the land available to the well driller where it will cause the least significant effect upon the mine.

5. In determining what location will result in the least significant effect, the permitted location must be compared with other possible locations for the well; comparison with an extrinsic standard is impermissible.

6. A well significantly interferes with the mine if its drilling forces a non-trivial alteration of the mine's previously projected operational plans or practices.

7. A well significantly endangers the mine if the altered operational plans or practices forced by the drilling of the well would non-trivially increase the hazards to workmen in the mine.

8. The mine operator bears the burden of proof, i.e., of production and persuasion, on the issue of whether the well unduly interferes with or endangers the mine.

9. The mine operator must not only show that the well could be drilled at an alternative location where the consequent interference with and endangerment of the mine would be less; it must also show that the well can be safely drilled at this proposed alternative location.

10. In the context of §2203 of the Act, "safely drilled" refers to the ability to safely conduct drilling operations or to the ability to safely locate a well upon a particular area of the surface tract. It does not refer to the safety of mine operations once the well has been drilled.

11. The test for undue interference and endangerment must be applied individually to each permitted well on a given surface tract, without reference to the fact that other wells also may have been permitted; in other words, for each permitted well the comparison described in Conclusion of Law 5, supra, must be performed, for all proposed alternative locations of that well.

12. Proposed alternative locations must be identified, explicitly and unmistakably, by the mine operator; it is neither DER's nor the well operator's burden to examine the entire site leased by the well operator for drilling sites which might be more suitable (from the standpoints of drilling safety or significant effect on the mine) than the originally permitted locations.

13. Consol failed to sustain its burden of proof on the issue of whether a well can be safely drilled at any proposed alternative location for George Well 5.

14. Under the new Oil and Gas Act, the definition of an operating well must be construed to be a well which is neither plugged nor abandoned; if either plugged or abandoned, the well cannot be operating.

15. The permits for George Wells 1, 2 and 4 expired by operation of law on April 18, 1985; therefore, this appeal is moot as to those wells.

ORDER

WHEREFORE, this 11th day of August, 1986, in light of the foregoing, it is ordered that this appeal is dismissed as to all four wells which are its subject. Our provisional order of March 28, 1985 in this matter is vacated, insofar as it ruled on the merits of Consol's appeal with respect to Wells 1, 2 and 4; the appeal is moot as to those wells. Insofar as Well 5 is concerned, the appeal has been dismissed on the merits.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

William A. Roth

WILLIAM A ROTH, MEMBER

DATED: August 11, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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SPEC COALS	:	
	:	
v.	:	EHB Docket No. 85-197-G
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued August 14, 1986

OPINION AND ORDER

Synopsis

A pro se appellant, who filed a very inadequate pre-hearing memorandum, was not sanctioned for that failure to obey the Board's orders. However,DER was given permission to conduct discovery to obtain information that should have been included in the appellant's pre-hearing memorandum. More than nine months after DER's consequent Interrogatories and Requests for Documents were filed, and less than two months before the scheduled hearing on the merits of this appeal, the appellant has not responded to DER's discovery requests. Nevertheless, the Board--primarily because appellant is appearing pro se--rejects DER's motion for severe sanctions, e.g., that appellant be prohibited "from presenting any evidence on its claims and defenses." The Board does impose the sanction of forbidding the appellant from presenting any expert testimony at the hearing on the merits. In addition, the appellant will be forbidden to introduce into evidence any documents he fails to produce within 15 days, and must respond within 15 days to any newly-filed DER requests for admissions.

OPINION

SPEC has timely appealed a DER letter dated March 28, 1985, forfeiting a $5,000 surety bond posted by the Travelers Indemnity Company under Section 4(d) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.4(d). The bond was posted in connection with SPEC's surface mining operations under mine drainage permit MDP 3473SM22T and mining permit MP 1596-1, in Unity Township, Westmoreland County. The bond was forfeited for failure to complete reclamation and to correct various violations at the site. Although Travelers as surety was notified of the forfeiture, it apparently is taking no part in the appeal; certainly the Board has had no communication of any kind from Travelers. SPEC's appeal, from its initiation until now, has been pursued by Robert E. Ankney, who identifies himself as "owner" of SPEC; Mr. Ankney, who is not an attorney, has been appearing pro se.

From the very outset, Mr. Ankney's inexperience and unfamiliarity with the law has caused problems--for SPEC, for DER and for the Board. SPEC's pre-hearing memorandum, filed pursuant to our Pre-Hearing Order No. 1, was less than a dozen lines in length; this very abbreviated pre-hearing memorandum did not meet the requirements set forth in Pre-Hearing Order No. 1. DER therefore requested the Board to order SPEC "to file a more specific pre-hearing memorandum, in full compliance with the Board's Pre-Hearing Order No. 1." Nevertheless, the Board, in an Order dated August 29, 1985, denied this DER request, saying, "Appellant is not represented by counsel. Under these circumstances his pre-hearing memorandum is sufficient to satisfy the requirements of the Board's Pre-Hearing Order."

DER then filed its pre-hearing memorandum, but also requested leave of

the Board "to conduct discovery to obtain the information that would otherwise be included in the pre-hearing memorandum." The Board granted this request, which seemed very reasonable, and to which SPEC did not object. On October 7, 1985, DER served Interrogatories and a request for productions of documents on Mr. Ankney. On November 25, 1985, the hearing on the merits of this appeal was set for September 15, 1986. On July 22, 1986, DER filed a motion to sanction SPEC for not having responded to the aforementioned discovery requests. Though the Board has waited the 20 days specified in our Pre-Hearing Order No. 2, SPEC has not filed any response to this motion, on which we now feel free to rule.

DER, under the authority of Pa. Rules of Civil Procedure Rule 4019(c), requests "that the Board issue an order deeming admitted all matters regarding which the Department propounded interrogatories and prohibiting Spec from presenting any evidence on its claims and defenses." Although such sanctions are within the boundaries permitted by Rule 4019(c), they are very severe. Thus we are not inclined to grant the sanctions requested by DER, especially because the instant bond forfeiture appeal is being handled by a pro se appellant; the Board, in an effort to be fair, always has been very lenient with such appellants. Howard Fugitt and James E. Gatten v. DER, Docket No. 83-029-G, 1983 EHB 483; Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183.

On the other hand, some sanctions are in order. We do not feel that Mr. Ankney's repeated failure to comply with the Board's rules and with the Rules of Civil Procedure should continually and inevitably be excused because Mr. Ankney (who has filed this appeal) has not secured the assistance of competent counsel. Penn Minerals Company v. DER, Docket No. 85-221-G

(Opinion and Order, July 31, 1986); Coltrane, Inc. v. DER, Docket No. 85-134-G (Opinion and Order, August 29, 1985). At the hearing on the merits of this appeal, SPEC--who has not answered DER's Interrogatory No. 12 inquiring about SPEC's possible expert witnesses--will not be allowed to introduce any expert testimony. In addition, SPEC will not be allowed to introduce into evidence any documents which will not have been produced--in accordance with the procedure described in DER's October 7, 1985 request for production of documents--within 15 days of the date of this Opinion and Order.

Finally we note that most of DER's Interrogatories--e.g., Interrogatory No. 6, which asked, "On what date was coal last removed from the Morgan Strip Mine?"--are not of the sort which, when unanswered, conveniently permit a sanction of "deeming admitted the matter regarding which questions were asked" [the language of Pa.R.C.P. Rule 4019(c)(1)]. However, if DER wishes to serve requests for admissions on SPEC, it is given leave to do so; SPEC will be required to file its answers to those requests for admissions within fifteen (15) days of receipt of the request, instead of the thirty (30) days normally allowed under Pa.R.C.P. Rule 1014(b), provided the 15-day period ends no later than September 10, 1986. In view of SPEC's protracted failure to respond to DER's Interrogatories, and in view of the fact that the hearing on the merits is scheduled for September 15, 1986, we believe this order is "just" in the sense of Pa.R.C.P. Rule 4019(c)(5). Moreover, Rule 1014(b), via 25 Pa.Code §21.111(f), authorizes the Board to set a time limit less than 30 days for responding to requests for admissions.

O R D E R

WHEREFORE, this 14th day of August, 1986, it is ordered that:

1. The specific sanctions requested in DER's July 22, 1986 motion for sanctions are denied.

2. However, SPEC is sanctioned as follows:

a. At the hearing on the merits, SPEC will not be allowed to introduce any expert testimony.

b. At the hearing on the merits, SPEC will not be allowed to introduce into evidence any documents which will not have been produced within 15 days of the date of this Order, where "production of documents" is defined as in DER's October 7, 1985 Request for Production of Documents.

3. DER is given leave to serve requests for admission on SPEC, to be answered within 15 days of the date of service, provided the 15-day period ends no later than September 10, 1986.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: August 14, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Patti J.Saunders, Esq.
For Appellant:
Robert E. Ankney

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JOSEPH M. BLOSENSKI, JR. and ADA BLOSENSKI	:	
v.	:	EHB Docket No. 85-222-M
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 15, 1986

OPINION AND ORDER

Synopsis

Appellant's Motion for Protective Order is granted according to the terms enunciated below. The Protective Order shall limit deposition testimony of Appellant, as stipulated by parties to this suit, to protect Appellant's constitutional right against self-incrimination.

The Department's Motion for Sanctions is granted because Appellant failed to respond to or comply with the Department's request for production of documents. The failure to respond by Appellant constitutes a waiver of any available defenses to production of documents. Appellant is ordered to produce documents, provide further deposition testimony not inconsistent with the Protective Order, and pay transcript costs of deposition.

OPINION

On May 14, 1985, the Department of Environmental Resources (Department) assessed civil penalties against Joseph M. Blosenski, (Appellant), and Ada Blosenski (Appellant's wife), under the Solid Waste Management Act, the

Act of July 7, 1980, P.L.380, 35 P.S. §6018.101 et seq. The Blosenskis were charged with the operation of a solid waste transfer station and dumping of solid waste without a permit. Joseph Blosenski appealed at Docket No. 85-222-M and Ada Blosenski appealed the assessment to the Board at Docket No. 85-236-M. A motion to consolidate these cases was filed by the Department and granted by the Board and the parties instituted discovery proceedings.

Department issued a Notice of Taking of a Deposition of Joseph Blosenski pursuant to 25 Pa. Code 21.111(b) and Rule 4007.1 Pa.R.C.P. The notice included, pursuant to Rule 4009 Pa.R.C.P., a Request for Production of Documents relating to the finances and operation of the Blosenski Disposal Service and the finances of Joseph and Ada Blosenski. During deposition of Appellant, the Department inquired into the purpose for which a compactor building, which was present on Blosenski Disposal Service property, was being used. See Deposition Transcript of November 20, 1985, pp. 56-57, 77-79. Counsel for Appellant objected, on constitutional grounds, to this inquiry by Department. Appellant's counsel argues that Appellant's answer to Department's inquiry may be self-incriminating, in violation of United States Constitution, Amendments 5 and 14, and the Pennsylvania Constitution, Article 1, Section 9. Appellant now seeks a Protective Order, in accordance with Rule 4012 Pa.R.C.P., preventing disclosure of potentially self-incriminating testimony. Appellant seeks to preserve his constitutional rights upon the possible institution of a parallel criminal proceeding. Cf. Delta Excavating and Trucking Company, Inc. v. DER, 1981 EHB 519.

In the Department's Response to Appellant's Motion for Protective Order, the Department does not contest Appellant's request for a Protective Order regarding the testimony concerning use of the compactor building.

Moreover, Appellant's request complies with Rule 4012. The Board, therefore, grants Appellant's Motion for Protective Order to the extent that Appellant need not answer specific questions propounded and objected to on constitutional grounds, on pp. 56-57 and pp. 77-79 of the Deposition Transcript of November 20, 1985. It should be noted that Appellant's silence will not cause him any prejudice during the Board's resolution of this case.

As noted above, the Department requested production of documents by Appellant at the time of deposition, pursuant to Pa.R.C.P. 4009. Appellant did not respond or object to the Department's request preceding the Deposition. Appellant, however, failed to produce documents at the Deposition of November 20, 1985. The Department now seeks sanctions, pursuant to Pa.R.C.P. 4019, for Appellant's failure to produce. Specifically, the Department seeks to have Appellant produce requested documents, make himself available for further deposition testimony, and pay for the additional transcript costs incurred during the supplemental deposition.

The scope of Appellant's Motion for Protective Order did not extend to the production of documents in question. This fact, however, is irrelevant because Appellant's failure to respond or object to the Department's request for production of documents prior to the time for production constitutes a waiver of all defenses available to Appellant regarding production of these documents. See Kuntz v. Firth, 216 Pa.Super. 155, 264 A.2d 432 (1970); Kern v. Bethlehem Steel Co., 21 D.& C. 3d 163 (1981); Hall v. Sears Roebuck & Company, 1978-1983 Alleg.Cnty Discov.Op.

121 (Ct.Cmn.Pleas.1980);* Design Roofing and Siding, Inc. v. Apache Foam Products Company, 1978-1983 Alleg.Cnty Discov.Op. 136 (Ct.Cmn.Pleas.1980).* Pennsylvania Rule of Civil Procedure 4019(a)(2) provides the failure to respond to a request for production of documents results in a waiver of future objections. See Hall v. Sears Roebuck, 1978-1983 Alleg.Cnty Discov. Op. 121 (Ct.Cmn.Pleas.1980). Appellant, in the case at issue, failed to respond to the Department's request for production of documents until the deposition, at which time Appellant failed to produce the documents. This failure to respond constitutes a waiver of future objections and subjects Appellant to sanctions under Rule 4019 Pa.R.C.P. and 25 Pa. Code 21.124. See Marino v. DER, 1984 EHB 547. The Department's Motion for Sanctions is granted and Appellant is ordered to produce at DER's Norristown Regional Office, at the earliest date of mutually reasonable convenience, the documents listed in DER's original Notice of Deposition and Request for Production dated October 7, 1985. Appellant shall also make himself available for further deposition, at the date agreed upon for production of documents, to provide additional deposition testimony not inconsistent with the Protective Order issued above. Finally, it is well established that a court, in its discretion, may impose reasonable expenses upon a party for noncompliance of a discovery request. See Roman v. Pearlstein, 478 A.2d 845, 329 Pa. Super. 392 (1984). In the instant case, Appellant should have provided opposing counsel with advance notice that it was not planning to complying with Department's discovery request. Accordingly, Appellant shall pay DER's transcript costs for the future deposition. DER, at its option, may employ its usual stenographic service or

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* This case appears in Allegheny County Discovery Opinions (1978-1983) by R. Stanton Wettick, Jr. and is available at, among other places, the Allegheny County Law Library in Pittsburgh, Pennsylvania.

require Appellant to employ another service.

ORDER

AND NOW, this 15thday of August, 1986, Appellant's Motion for Protective Order is granted and the Department's Motion for Sanctions is granted, the details of these orders contained herein.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 15, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esquire
Eastern Region
For Appellants:
Patrick C. O'Donnell, Esq./For Joseph Blosenski
Nancy Balliet, Esq./For Ada Blosenski

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

PERRY TOWNSHIP BOARD OF SUPERVISORS :

:

: Docket No. 86-256-G

: Issued: August 19, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

A letter which informs the operator of a landfill that operation without a permit is unlawful, and which "hopes" the operator "voluntarily" will close the landfill, but which does not explicitly order the operator to close, is not an appealable DER action. Therefore the appeal from the letter is dismissed.

OPINION

Perry Township has appealed a letter from DER, which reads in full as follows:

> The Township is currently operating a landfill without a permit from the Department as required by Sections 201 and 501 of the Solid Waste Management Act, (Act 1980-97, 35 P.S. Section 8018.101 et seq.) and therefore is in violation of Section 610.1 of the Act.
>
> The Department has inspected this site for a number of years for compliance with the operational standards for landfills. Although the Department has not initiated any form of enforcement action

> in the past, we will in the near future be taking appropriate action against any municipal waste landfill which is operating without a permit. The Secretary of the Department has instructed the Bureau that any municipal waste landfill which does not have a permit should be closed by June 30, 1986.
>
> You may wish to investigate other options for waste disposal in your municipality such as centralized collection stations and/or arrangements with a private contractor. You may also wish to contact the County Commissioners regarding possible alternatives since there are no permitted landfills in Greene County other than several small permitted township sites operated for residents of particular townships.
>
> It is our hope that you will voluntarily comply with this notice, terminate operations and properly close and revegetate your site. Please notify this office in writing within thirty (30) days of your intentions. If you feel a meeting to discuss this matter would be helpful, contact us at the above number.

DER now has filed a motion to dismiss the appeal, on the grounds that the above-quoted letter is not an appealable action. Township has responded to the motion, saying, in effect, that it appealed to protect its rights in the event the letter actually was an appealable action. The Township also states categorically that it will not voluntarily terminate operations.

Since the Township is throwing down the gauntlet to DER, it is clear that dismissing this appeal as having been taken from a unappealable DER action only will result in a categorical appealable DER order to close the landfill, which the Township again will appeal. Thus dismissing this appeal hardly is in the interests of judicial economy.

Nevertheless, we cannot lightly overthrow the considerable Board precedent which holds that a mere notice of violation, or any other DER letter whose function is to inform the recipient rather than to require compliance

with a specific order, is not an appealable action. Perry Brothers Coal Co. v. DER, 1981 EHB 583; K.M.&K. Coal Company v. DER, Docket No. 86-201-W (Opinion and Order, June 24, 1986); Doran & Associates v. DER, Docket No. 86-166-G (Opinion and Order, July 23, 1986). The above-quoted letter is purely precatory; it "hopes" for "voluntary" compliance. Such a letter is not an order or other final action which is appealable under 25 Pa.Code §21.2(a).

O R D E R

WHEREFORE, this 19th day of August, 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, Chairman

Edward Gerjuoy

EDWARD GERJUOY, Member

William A. Roth

WILLIAM A. ROTH, Member

DATED: August 19, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Patti J. Saunders, Esq.
Western Region

For the Appellant:
J. William Hook, Esq.
HOOK AND HOOK
Waynesburg, PA

GLOBE DISPOSAL COMPANY, INC.	:	
and	:	
WASTE TECHNIQUE CORPORATION	:	
	:	
v.	:	EHB Docket No. 85-517-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: August 22, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

The Department of Environmental Resources' action in revoking a solid waste permit for the incineration of wastes as a result of alleged improper practices in collecting, processing, and disposing of infectious hospital wastes is superseded pending an adjudication on the merits. Petitioners have satisfied all three elements of Rule 21.78(a)

OPINION

This matter was initiated on November 26, 1985, by the filing of a Notice of Appeal by Waste Technique Corporation ("WASTECH") and Globe Disposal Company, Inc. ("Globe"). Globe is in the business of transporting municipal waste from commercial, institutional and residential customers to the WASTECH solid waste processing/recycling facility and incinerator at the

River Road site.[1] Globe and WASTECH sought review of a November 22, 1985 Department of Environmental Resources' ("Department") order directed to the two corporations, Frank J. Keel and Earl Kelly. The order, which was issued pursuant to §§104, 201, 501, 503, 601, 602, 603 and 610 of the Solid Waste Management Act, the Act of July 8, 1980, P.L. 380, 35 P.S. §§6018.104, 6018.201, 6018.503, 6018.601, 6018.602, 6018.603 and 6018.610. ("the SWMA"), revoked Solid Waste Permit No. 300662, which was issued to WASTECH and authorized the operation of an incinerator for the disposal of solid waste at 400 River Road, Conshohocken; prohibited the acceptance, handling, processing, incineration, or disposal of solid waste at the River Road site; and directed the removal of any solid waste stored at the site. Violations of the SWMA and the rules and regulations adopted thereunder at 25 Pa.Code §75.1 et seq. alleged to exist during inspections conducted on July 24 and November 20, 1985; violations which led to the issuance of Department orders on March 1 and 3, 1982; a July 9, 1982 denial of a transporter license to Globe; alleged violations by Globe of regulations pertaining to hazardous waste transportaion; and alleged convictions of two principals of Globe and WASTECH were put forth as the basis for the Department's order.

A Petition for Supersedeas accompanied the Notice of Appeal. After a telephone conference call with counsel for the parties on December 4, 1985, Member Anthony J. Mazullo, Jr. issued a supersedeas. The Department filed a Motion for Reconsideration en banc on December 13, 1985, which was denied by the Board in an order dated December 19, 1985. A hearing on the Petition for Supersedeas was held on December 16, 1985. Member Mazullo ruled during the

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[1] Globe transports municipal, as opposed to hospital, waste to the WASTECH facility. The term "hospital waste" is synonymous herein with infectious and/or pathological waste generated by health care providers.

course of the December 16 hearing that it would be limited to consideration of the findings set forth in Paragraph J of the Department's order, specifically those relating to the Department's July 24, 1985 inspection of the incinerator. Upon Mr. Mazullo's resignation from the Board on January 31, 1986, the matter was reassigned to Board Chairman Maxine Woelfling. Further hearings on the Petition for Supersedeas were held on March 17 and 18, 1986, and post-hearing briefs were filed by the parties. For the reasons set forth below, the Board's supersedeas order of December 4, 1985 shall remain in effect until this matter is adjudicated on the merits.

Rule 21.78(a) of the Board's rules of practice and procedure sets forth the standards governing the denial or grant of a supersedeas:

> §21.78(a). Circumstances affecting grant or denial.
> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive commonn law as requiring consideration of the following factors:
> (1) Irreparable harm to the petitioner.
> (2) The likelihood of the petitioner's prevailing on the merits.
> (3) The likelihood of injury to the public.

A party seeking a supersedeas bears the burden of satisfying all three standards enumerated in Rule 21.78(a). Carroll Township Authority v. DER, 1983 EHB 239, 240. Globe and WASTECH have satisfied all those standards.

In determining the likelihood of Petitioners prevailing on the merits, we must look to the violations enumerated in Paragraph J of the Department's order, namely those arising out of the Department's July 24, 1985 inspection of this facility, as the supersedeas hearing was limited to consideration of this issue.

The Department, in Paragraph J(1) of the order, has alleged that improper open containers of hospital waste existed at both the transfer

station and the incinerator and that the hospital waste was not handled in accordance with procedures approved by the Department. These, in turn, constituted violations of 25 Pa.Code §§75.28(c)(3), 75.28(c)(4), 75.28(d), 75.29(b), 75.30(g) and 75.31(c)(1).

Section 75.28 is entitled "General Standards for Storage of Solid Waste." Sections 75.28(c)(3) and (c)(4) provide that:

> (c) Individual containers or bulk containers utilized for the storage of solid waste shall have the following physical characteristics:
>
> * * * * *
>
> (3) Equipped with tight-fitting lids.
>
> (4) Constructed in such manner as to be watertight, leak-proof, weather-proof, insect-proof and rodent-proof.

Based on the testimony and an examination of Petitioners' Exhibit 16, a fiber drum with an interlocking metal ring lid, it is difficult to see how these two subsections of 25 Pa.Code §75.28 were violated. The Department's major concern seemed to be that the metal lids were removed from the drums containing infectious and pathological wastes in red bags prior to incineration. There is no regulatory requirement that such lids be incinerated, and it is only common sense that a non-incinerable metal lid be removed before an incinerable container of waste is placed in the incinerator. Although much sensational speculation was put forth by the Department about the possibility of WASTECH employees contracting infectious diseases as a result of removal of these lids, no valid public health reason was proffered by the Department to counter WASTECH's logical, common-sense explanation.

Section 75.28(d) states that "Individual containers shall be used and maintained so as to prevent public nuisances." Presumably, the Department believed that its observations of fiber drums being painted at the

recycling facility constituted a violation of this standard because bloodstains were painted over; the drums could have only acquired such stains as a result of contact with infectious or pathologic waste; and the possibility of contagion being spread by contact with such wastes constituted a public nuisance. There was no proof that the drums being painted over for reuse ever contained infectious or pathological waste, nor did the Department offer any testimony to rebut Petitioners' testimony that the blood stains were on drums picked up from Globe customers operating food processing and meat packing operations.

With respect to the remaining three violations in Paragraph J(1), it is difficult to understand their relevance to this matter. Section 75.29(b) states that:

> (b) Collection and transportation equipment.
> The waste shall be suitably enclosed or covered so as to prevent roadside littering, attraction of vectors or creation of other nuisances.

This regulation seems to be more addressed to collection at and transportation from the generator of the waste, but, in any event, there was no evidence that Globe's manner of collecting and transporting the waste to the River Road facility created any nuisance. Section 75.30(g) is taken from a section entitled "Standards for Solid Waste Incinerator Facilities" and provides that:

> (g) Refuse storage facilities.
> Refuse storage facilities shall be provided to conform with the operation of the incinerator. They shall be designed to eliminate nuisances and to facilitate incinerator operations.

The second sentence is a design standard best applied in the permitting phase, and we fail to see how the storage facilities at the site did not "conform with the operation of the incinerator," whatever the meaning of that

phrase. And, §75.31(g) states, in pertinent part, that hospital wastes "require special consideration while being stored prior to final disposal. All such wastes shall be handled in a manner approved by the Department." It is not clear that the "manner approved by the Department" relates to the permit issued to this facility or to some other ad hoc requirements, as there are no specific or generic requirements in the regulations. If §75.31(g) also relates to disposal of hospital wastes, there seemed to be some contention by the Department that Globe was improperly disposing of hospital wastes, but no evidence was brought forth to counter Globe and WASTECH's testimony that it was disposed of properly.

Paragraph J(2) of the order sets forth violations of §§75.28(a), 75.28(d), 75.29(a), 75.29(b) and 75.29(g) as they relate to "opening and reusing without proper disinfection, containers of hospital waste at the incinerator, and processing hospital waste at a transfer station which has no permit for the processing of hospital waste. . ." Section 75.28(d) was quoted supra, and §75.28(a) provides:

> (a) The storage of all solid waste shall be practiced so as to prevent the attraction, harborage, or breeding of insects or rodents and to eliminate conditions harmful to public health or which create safety hazards, odors, unsightliness and public nuisances.

Section 75.29(b) was also quoted supra, while §§75.29(a) and 75.29(g) state:

> (a) Compliance.
> Solid waste shall be collected and transported so as to prevent public health hazards, safety hazards and nuisances.
>
> * * * * *
>
> (g) All solid waste collected shall be transported to a processing or disposal site approved by the regulatory agency having jurisdiction.

As to the issue of reuse of the fiber drums, the regulations cited do not proscribe such reuse, and, even if they did, there is no evidence that drums

containing red bag waste were recycled. As for the question of whether hospital waste was processed at a transfer station not authorized to process it, the evidence is voluminous that the appearance of hospital waste at the recycling facility was the result of sloppy practices by the generators, practices over which Globe had no direct control unless the Department expected it to examine every bit of waste in the roll-a-way containers at health-care facilities and sort through it to remove infectious and pathological wastes. Such an expectation on the part of the Department could only increase the danger of contracting the litany of dangerous diseases which may be acquired by handling these wastes, a danger the Department contended it wished to prevent by the issuance of this order. Globe and WASTECH did undertake extensive efforts to inform their customers of their improper disposal practices and eradicate or minimize them through better housekeeping practices (Petioners' Exhibits 21, 23-28).

As for the allegations in Paragraph J(3) of the order that Globe and WASTECH failed to perform proper maintenance in order to keep the grounds free of litter in violation of 25 Pa.Code §75.30(m),[2] there is evidence that debris was present, especially at the recycling facility where it may have fallen when dumped from vehicles onto a loading area. But, since we are dealing with a single incident and the effect of it is de minimis, given the character of the surrounding area, we believe it is not a bar to Petitioners' demonstrating that they are likely to succeed on the merits.

In concluding that Globe and WASTECH are likely to succeed on the

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[2] This subsection, which is applicable to incinerators, provides:

> (m) Maintenance of buildings and grounds.
>
> Housekeeping routines and grounds maintenance shall be performed regularly to assure that dust and dirt do not accumulate and that grounds are maintained free of litter or debris.

merits, at least as related to the July 24, 1985 inspection, we have not been unmindful of the Department's approach to regulation of the field of hospital wastes, as applied in this matter. The regulations found at 25 Pa.Code §§75.28-75.31 do not, with the exception of the vague passage in §75.31(c)(1), specifically address this area. We do not mean to suggest that the Department's regulations have to be so waste-specific as to contemplate every conceivable type of waste generated by every conceivable type of facility. Nor do we wish to hamper the Department's flexibility to address problems through the adoption and implementation of policies in appropriate circumstances. The evidence in this matter suggests that a more ordered approach is in order. The inspectors responsible for monitoring the facility appeared to have had little familiarity with either the permit issued for the facility or the specialized problems in handling and disposing of hospital wastes. Regulatory agencies and health care providers have differing views of what constitutes infectious waste, and the Department appears to have imposed new requirements on the disposal of hospital wastes with little notice. While the Department attempted to convince the Board with lurid testimony regarding blood-encrusted bandages, discarded syringes and instruments, and assertions that handling such wastes would open up a Pandora's box of viruses and bacteria, we believe that the public interest would have been better served by the development of rational and comprehensive guidelines, in consultation with health care providers, the Department of Health, and the disposal industry, than the approach that is apparent in this case.

The Board, in assessing whether a petitioner has or will suffer irreparable harm as a result of a Department action, has also considered whether the Department has abused its discretion in taking the action.

Armond Wazelle v. DER, 1984 EHB 865. While we do not disagree with the contention that the costs of compliance with a Department order alone cannot constitute irreparable harm, we have also ruled that "We do not think our Rule 21.78 or the common law can imply that a petitioner should be denied a supersedeas from an egregiously unjustified order because his harm would result solely from compliance with the order." William Fiore v. DER, 1983 EHB 528, 531. We do not believe Petitioners can assert irreparable harm on behalf of their customers, but we do believe there is sufficient testimony to establish irreparable harm to Petitioners as a result of curtailing operations, reducing revenues, and furloughing employees. And when coupled with our ruling regarding Petitioners' likelihood of success on the merits, we think that, consistent with our assessment of this issue in Fiore, Petitioners have satisfied this test.

The third part of the supersedeas test requires the Board to assess whether the petitioner has demonstrated that the grant of a supersedeas will not result in injury to the public. A liberal interpretation of the principle set forth in PUC v. Israel, 356 Pa. 400, 52 A.2d 317 (1974), would require that any violation of the solid waste management regulations, because it is statutorily declared to be a nuisance, would constitute injury to the public. But, we have ruled in William Fiore v. DER, supra, that we would not so rigidly interpret Rule 21.78(e)(3) as to regard any violation of the regulations as injury to the public, especially where there is no potential environmental harm. Although the Department's order contains an exhaustive recitation of violations of the solid waste management regulations, many of the cited regulations are very general. The likelihood of injury to the public as a result of violations of those regulations is very slight in the factual circumstances we have before us.

No substantial credible evidence was brought forth by the Department to counter Globe and WASTECH's evidence that their waste handling and disposal techniques posed no public health threat, either to their own employees or the general public. The Department's testimony regarding the July 24, 1985 inspection was tentative, speculative, and highly subjective. Of critical importance to our conclusion regarding likelihood of injury to the public is the location of this facility. The Department's own expert, Dr. Bruce Klaeger, observed that the processing and disposal of the hospital wastes occurred in a heavily industrial area.[3] While Dr. Klaeger believed that the site constituted a public health threat, his opinion was based primarily on the observations of the Department's inspectors. He was only at the site once, when he drove through it with a Department inspector on November 20, 1985. In fact, he testified that he observed no condition on that day which would have constituted a nuisance or a threat to public health.

Even if the evidence tended to establish that some threat to public health existed, that threat was not identifiable.[4] The Department produced testimony that the public would be exposed to virtually every infectious disease known to medical science. It opined that this was so because Globe and WASTECH processed wastes from Philadelphia hospitals which treated patients from the area who, in addition to being exposed to the more commonly known infectious diseases, may have been exposed to the more exotic varieties making their way into the area through the port of Philadelphia. But, Dr. Klaeger testified he could not identify which hospital wastes put the public

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[3] The facility is bordered by a quarry and an abandoned steel mill and coke plant, among other facilities, and is two to three miles from any residences.

[4] If the public health threat was so real, we are amazed that it took the Department four months after the inspection to issue the order now before us.

at risk without reviewing the charts of each patient who generated the waste. This is simply too speculative and remote.

ORDER

AND NOW, this 22nd day of August, 1986, for the foregoing reasons, it is ordered that the Board's supersedeas order of December 4, 1985, in this matter shall be extended until there is an adjudication on the merits. The Commonwealth shall file its pre-hearing memorandum on or before September 11, 1986, and Appellants shall file their answering pre-hearing memorandum within 15 days of receipt of the Commonwealth's pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED:

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bl

GLEN IRVAN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 86-179-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 22, 1986

OPINION AND ORDER

Synopsis

Appellant's appeal is dismissed for failure to comply with an order of the Board. The sanction of dismissal for failure to comply is authorized by 25 Pa. Code §21.124.

OPINION

Glen Irvan Corporation (Appellant) conducts a surface mining operation in Goshen Township, Clearfield County. The Department of Environmental Resources (Department) denied Appellant's application for a Bonding Increment to a Surface Mining Permit on March 3, 1986. Appellant timely appealed the Department's decision to the Environmental Hearing Board (Board) on March 31, 1986. Although the Notice of Appeal indicated Appellant was represented by counsel, no notice of appearance, as required by Rule 21.23, was filed by counsel. Consistent with the Board's rules of practice, the Board issued a Pre-Hearing Order (No.1-MW) on April 3, 1986 which required, among other things, the filing of a Pre-Hearing Memorandum by the Appellant by June 18,